Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ALACARE HOME HEALTH SERVICES, INC.,
Petitioner,

v.

GADSDEN REGIONAL MEDICAL CENTER, formerly
BAPTIST HOSPITAL OF GADSDEN, INC.,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether there exists a viable federal question for review by this Court.

2. Whether the decision of the Alacare Certificate of need ("CON") Review Board regarding the Alacare project was arbitrary and capricious, in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

LIST OF ALL PARTIES TO THE PROCEEDINGS

Petitioner/Plaintiff:

Alacare Home Health Services, Inc.
(no parent corporation or subsidiaries)

Respondent/Defendant:

Quorum Health Care Management, Parent Corporation:

Gadsden Regional Medical Center (formerly, Baptist Hospital of Gadsden, Inc.)

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PETITION FOR WRIT OF CERTIORARI

REFERENCE TO REPORT OF OPINIONS

The Supreme Court of Alabama denied the Petition for Writ of Certiorari to the Court of Civil Appeals filed by Alacare Home Health Services, Inc. ("Alacare") on February 3, 1995. *See* A-54a. The Court of Civil Appeals decision, from which this appeal is taken, is *Alacare Home Health Services, Inc. v. Baptist Hospital of Gadsden, Inc.*, 1994 WL 182001, —— So.2d —— (Ala. Civ. App. 1994), *cert. denied*, —— So.2d —— (Ala. 1995). A-1a.

GROUNDS FOR JURISDICTION

The decision being reviewed by this Court is the judgment of the Court of Civil Appeals of Alabama, dated May 13, 1994. The Court of Civil Appeals of Alabama

denied rehearing on June 17, 1994. The Supreme Court of Alabama denied petitioner Alacare's writ of certiorari to that court on February 3, 1995, which denial gave rise to this petition.

This Court has jurisdiction over the present case under 28 U.S.C. § 1257(a) of the United States Code. Supreme Court Rule 10.1(c) also states that jurisdiction is proper "when a state court . . . has decided an important question of federal law in a way which conflicts with the applicable decisions of the Court."

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED HEREIN

Amendment XIV of the Constitution of the United States, the State of Alabama Code of 1975 § 22-21-260 *et seq.*, and the regulations governing the award of applications of Certificate of Need, compiled in the Alabama State Health Planning Agency ("SHPA") Administrative Code (revised 1994) ("SHPA Rules"), as promulgated by SHPA, which are relevant to this case, are set out in the appendix hereto.

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STATEMENT OF THE CASE

This cause of action involves the arbitrary and capricious nature of the Alabama CON Review Board's method of awarding CONs, which violates the petitioner's constitutional right to due process protections afforded by the Fourteenth Amendment to the United States Constitution. *See*, A-78a. The case originated as a CON matter, dealing with the health planning and development scheme under which Alabama health care providers operate. SHPA is the state agency which develops and administers the state's CON program. Any entity or person is required to obtain a CON before acquiring, constructing, or operating a new institutional health care service or facility. § 22-21-260 *Ala. Code* (1975).

Baptist and Alacare filed competing CON applications in March of 1991. Baptist sought to establish a new home health agency in Etowah county, whereas Alacare sought to expand its existing home health agency into Etowah county. (An intervening party was involved at this stage of the process, however, that party withdrew and is not relevant for purposes of this Court's review). The applications in consideration were batched for comparative review at the December 3, 1991 board meeting. Each applicant presented its case, and the Board then voted to decide which entity would receive the CON award. Alacare's application was denied at that time in favor of Baptist. A-63a.

Alacare timely filed a request for reconsideration of the Board's ruling on December 24, 1991. At the next meeting of the Board, on January 1, 1992, the Board failed to establish a quorum to consider the merits of Alacare's claim, and thus the request was deemed denied. Thereafter, on January 17, 1992, Alacare filed a timely request for a fair hearing regarding the Alacare and Baptist CON proposals. Fair Hearing Officer Mark D. Wilkerson was assigned by SHPA, and the parties stipulated that the hearing officer was to make his deci-

sion based on the record and written pleading submitted by the parties up to that point.

After a thorough review of the complete record, the fair hearing officer ruled that the Board's findings were not supported by the record and ordered the Board's decision reversed, denying Baptist's CON application and granting Alacare's CON. A-62a. The hearing officer further found that the Board, in making its decision, had deviated from standard procedures routinely applied by the Board, which deviation was held to be arbitrary and capricious in nature. A-62a.

About July 20, 1992, Baptist filed its petition for judicial review of SHPA's final decision with the circuit court of Etowah County, Alabama. After the parties briefed the pertinent issues for review, particularly the issue of the arbitrary and capricious nature of the Board's actions, the court entered its ruling on June 10, 1993. In his memorandum opinion, which was largely adopted from a proposed opinion submitted by Baptist, Judge William Rhea ruled that the Board's original decision granting Baptist's CON was reasonable, not arbitrary and capricious. A-5a. The circuit court held that the Board did use fixed standards in its decision, which provide the justification for the Board's selecting Baptist as the "most appropriate applicant." A-33a, 36a. The court also held that the fair hearing officer exceeded the proper scope of review in his finding that the Board had used standards which deviated from its normal criteria and method of choice. A-7a, 33a. The circuit court found clear error with the fair hearing officer's decision and reversed that order in favor of awarding Baptist a CON. After Alacare filed a motion for reconsideration and clarification, on June 24, 1993 the circuit court issued an order clarifying his judgment and issuing an injunction specifically allowing Alacare to operate should it appeal that judgment.

Alacare timely perfected an appeal in the Alabama Court of Civil Appeals, and on May 13, 1994 the ap-

pellate court affirmed the circuit court opinion. A-1a. In that decision the appellate court held that the Board's action in deviating from its normal criteria was not arbitrary, but was within the Board's discretion, and was thus reasonable. A-4a. The court further held that the final SHPA decision by the fair hearing officer should be set aside because the hearing officer erroneously gave considerable weight to the cost factor over the accessibility factor.

Alacare filed a timely application for rehearing, which the Court of Civil Appeals denied on June 17, 1994. A-53a. Thereafter, the petitioner filed a petition for writ of certiorari with the Supreme Court of Alabama. That petition was denied on February 3, 1995, after which time the petitioner filed notice with the circuit court of Etowah County that it intended to petition this Court for a writ of certiorari to the Supreme Court of Alabama.

The federal question for review before this Court is that of the Board's arbitrary deviation from fixed review standards, which action Alacare contends violates principles of substantive due process as protected by the Fourteenth Amendment. The question of the Board's arbitrariness originated and was first raised by the petitioner at the administrative level upon fair hearing review and thereafter at each level. The issue was raised and discussed in the SHPA fair hearing final order and the circuit court and the appellate court opinions.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THIS CASE AND MAY APPROPRIATELY DECIDE THE QUESTION PRESENTED FOR REVIEW

The threshold issue which petitioner raises before this Court is whether the decision of the Board in denying the Alacare CON, while emphasizing different standards than with CON applications of other facilities, was violative of principles of due process under the law. Alacare contends that the Board granted the CONs of three other facilities using the mandatory fixed set of standards which it does consider, but in deciding between Alacare's and Baptist's applications, the Board, without reason, used a differently prioritized set of standards than with the prior applications. That arbitrary deviation from the fixed review standards caused the Board to conclude that Baptist was the "most appropriate applicant," thus awarding the CON to Baptist. Alacare contends that had the Board used its fixed set of standards, the Board would have only been able to select Alacare as the most appropriate application. That arbitrary and capricious use of different, inconsistent standards for deciding between competing CON applicants by the Board violates the due process rights of the petitioner, Alacare. The constitutional question of due process violations, therefore, is the question which gives this Court jurisdiction to review the petitioner's case.

A. The Federal Question Was Properly Presented

This Court has held that, in order for the Court to assume jurisdiction over a case, the federal question presented in that case must be "either raised or squarely considered and resolved in state court." *Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983). In the present case, the petitioner has raised, and the lower courts have thoroughly discussed, the issues of arbitrariness and capriciousness. The petitioner understands that it bears the burden of persuading this Court of its jurisdiction over

this petition absent any express reference in the opinion of the court below to the federal constitutional provision upon which the petitioner relied in that court. *Gates*, 462 U.S. at 218-220.

In the final stage of the administrative agency's review, at the fair hearing, Hearing Officer Mark D. Wilkerson concluded that the CON Review Board's decisions were unreasonable, arbitrary and capricious, and due to be set aside. *See*, A-55a. That finding by the fair hearing officer is the final decision of the agency according to § 22-21-275(4) of the Alabama Code of 1975, and is afforded a presumption of correctness, unless found clearly erroneous upon review. *Methodist Homes for the Aging Corp. v. Stewart*, 594 So.2d 161 (Ala. Civ. App. 1992); *State Health Planning and Resource Development Admin. v. Rivendell*, 469 So.2d 613 (Ala. Civ. App. 1985). At every stage of the proceedings below the arbitrariness of the Board's decision was briefed by the petitioner and discussed by the courts. Although the petitioner acknowledges that it did not mention specifically the substantive due process clause in its argument, still the Fourteenth Amendment prohibition against arbitrary and capricious government action was and remains the basis of the argument at issue in the instant case.

Upon judicial review of the final agency decision, the circuit court found that the fair hearing officer exceeded the scope of review of the Board ruling. *See*, A——a, circuit court memorandum opinion. However, the court acknowledged that it was properly within the scope of review for the hearing officer to consider "whether SHPA made an arbitrary or capricious decision, or abused its discretion in deciding among competing applications. . . ." *Alacare Home Health Services, Inc. v. Baptist Hospital of Gadsen, Inc.*, 1994 WL 182001, —— So.2d —— (Ala. Civ. App. 1994), *cert. denied*, —— So.2d —— (Ala. 1995). A-2a. SHPA *Rules*, § 410-1-8-.22(a)(2). A-92a. The circuit court went on to refute at length the hearing officer's finding of arbitrariness, stating that

"a decision is not arbitrary where there is a reasonable justification for the decision or where the determination is founded upon adequate principles or fixed standards." *Sexton v. Tuscaloosa County Civil Service Bd.*, 426 So.2d 432, 435 (Ala. Civ. App. 1983) (emphasis in original).

The Alabama Court of Civil Appeals affirmed the opinion of the circuit court, finding that it was within the Board's discretion to weigh "the accessibility factor over the cost factor." *Alacare*, 1994 WL at *2. The Court of Civil Appeals thus held that the action of the Board in deviating from the usual weights of standards used for different CONs was not arbitrary or capricious, nor erroneous. *Id.* That same court later overruled petitioner's application for rehearing in this case.

B. The Supreme Court of Alabama Has Consistently Entertained Issues That Were Not Timely or Directly Raised

The Supreme Court of Alabama has on at least seventeen separate occasions entertained issues not timely or directly raised by petitioners.[1] *E.g., Central of Georgia R. Co. v. Steed*, 287 Ala. 64, 248 So.2d 110 (1971).

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[1] The Supreme Court of Alabama has routinely entertained constitutional and statutory questions which were either not timely or not directly raised. *See, Aetna Life Ins. Co. v. Lavoie*, 45 U.S. 813 (1985); *Brown Mech. Contractors, Inc. v. Centennial Ins. Co.*, 431 So.2d 932 (Ala. 1983); *First Alabama Bank of Montgomery, N.A. v. Martin*, 425 So.2d 415 (Ala. 1983); *Chapman v. Rivers Const. Co.*, 284 Ala. 633, 227 So.2d 403 (1969); *City of Troy v. McClendon*, 279 Ala. 553, 188 So.2d 281 (1966); *Goodyear Tire & Rubber Co. v. Downey*, 266 Ala. 344, 96 So.2d 278 (1957); *Patterson v. Gaines*, 264 Ala. 184, 85 So.2d 893 (1956); *Lloyd v. Stewart*, 258 Ala. 627, 64 So.2d 884 (1953); *Childress v. Younger*, 258 Ala. 219, 61 So.2d 808 (1952); *City of Birmingham v. Bowen*, 254 Ala. 41, 47 So.2d 174 (1950); *Atlanta, Birmingham & Coast R. Co. v. Cary*, 250 Ala. 675, 35 So.2d 559 (1948); *Carter v. Carter*, 247 Ala. 409, 24 So.2d 759 (1945); *Snellings v. Builders' Supply Co.*, 229 Ala. 1, 155 So. 858 (1934); *Dent v. Foy*, 210 Ala. 160, 97 So. 627 (1923);

The erroneousness of the Board's decision based on its arbitrariness was raised and ruled upon at each level of review, and the unconstitutionality of that decision is expressly raised now upon this petition. The issue of the unconstitutionality of the Board's actions is simply an enlargement of the "arbitrary and capricious nature" argument which has been considered throughout this cause of action. *Accord, Dewey v. Des Moines,* 173 U.S. 193, 197-98 (1899). Further, no state statute or rule of court procedure in Alabama prohibits the raising of new questions at least as late as the Application for Rehearing after a ruling by the Alabama Supreme Court has been issued. Therefore, the issue of whether questions can be considered by the Alabama Supreme Court that are not timely or directly raised is established by the actual practice and decisional law of that court. *Accord, Hathorn v. Lovorn,* 457 U.S. 255, 263 n.13 (1982).

The court below has, over the years, heard and ruled upon various new questions that were arguably untimely.[2]

Montgomery Light & Water Power Co. v. Thombs, 204 Ala. 68, 87 So. 205 (1920); *New York Life Ins. Co. v. Reese,* 201 Ala. 673, 79 So. 24 (1918); *Lawrence v. Jones,* 37 Ala. 388 (1861).

[2] *Louisville & Nashville R. Co. v. Western Union Telegraph Co.,* 195 Ala. 124, 71 So. 118 (1916); *Dunn v. Dean,* 196 Ala. 486, 71 So. 709 (1916); *Copeland v. Pope,* 198 Ala. 257, 73 So. 490 (1916); *Gibbons v. Gibbons,* 205 Ala. 636, 88 So. 833 (1921); *Martin Building Co. v. Imperial Laundry Co.,* 220 Ala. 90, 124 So. 82 (1929); *Consolidated Coal Co. v. State,* 236 Ala. 489, 183 So. 650 (1938); *Huie v. Smith,* 236 Ala. 516, 183 So. 661 (1938); *Federal Land Bank of New Orleans v. Williams,* 237 Ala. 318, 186 So. 689 (1939); *Dodson v. Beaird,* 237 Ala. 587, 187 So. 862 (1939); *Sisson v. Swift,* 243 Ala. 289, 9 So.2d 891 (1942); *Goodgame v. Dawson,* 242 Ala. 499, 7 So.2d 77 (1942); *Rudolph v. Rudolph,* 251 Ala. 317, 36 So.2d 902 (1948); *Howell v. Roueche,* 263 Ala. 83, 81 So.2d 297 (1955); *Bienville Mortgage Corp. v. Mayo,* 286 Ala. 675, 245 So.2d 819 (1971).

Several cases stand as examples of the court's willingness to rule upon issues that are not timely or directly raised. *See, Lovett v. Uptain,* 450 So.2d 113, 116 (Ala. Civ. App. 1983), *aff'd sub. nom. Ex Parte Lovett,* 450 So.2d 116, 118 (Ala. 1984); *King v. Reid,* 428 So.2d 611, 615 (Ala. 1983); *Kirkland v. Kirkland,* 281 Ala. 42, 198 So.2d 771, 777 (1967); *Ex Parte Hanna,* 267 Ala. 527, 103 So.2d 720 (1958).

The petitioner thus asserts that this Court may in fact rule on the issue presented herein, under its ruling in *Barr v. City of Columbia,* 378 U.S. 146, 149 (1964). In *Barr,* this Court held that in order for a court to allow a procedural rule act as a bar to entertaining substantial federal questions, the court below must strictly and regularly follow that procedural rule, applying it evenly in all cases. 378 U.S. at 149. More recently, this Court has held that "[s]tate courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." *Hathorn,* 457 U.S. at 263. The *Hathorn* decision also counseled that if the current practice in applying a procedural rule is not evenly applied, past strict application will be overlooked. *Id.*

Thus, based on the established case law on this issue, the petitioner asserts that this Court may in fact properly assume jurisdiction over the issue of the Board's violation of the substantive due process rights of the petitioner, Alacare, in its award of a CON to Baptist, arbitrarily deviating from its established, fixed standards for deciding between competing CON applications.

II. THE DECISION OF THE CON REVIEW BOARD REGARDING THE ALACARE PROJECT WAS ARBITRARY AND CAPRICIOUS, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The Due Process Clause of the Fourteenth Amendment to the United States Constitution comprises a "general prohibition against arbitrary and unreasonable governmental action." *Thompson v. Gallagher*, 489 F.2d 443, 446 (5th Cir. 1973). The clause provides, in pertinent part, "[n]or shall any state deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV. Due process principles constitute two different types of protection. Procedural due process ensures that the mechanism with which a citizen's property rights are challenged and sometimes deprived meet minimum prescribed standards. Substantive due process principles protect an individual's rights against arbitrary government action which encroaches upon a protected right by requiring that legislation must be rationally related to a legitimate government purpose. *See, Wolff v. McDonnell*, 418 U.S. 539 (1974); *Gallagher*, 498 F.2d at 447.

Alacare contends that the decision of the Board regarding the award of the CON to Baptist was a decision not reasonably justifiable or based upon fixed standards. The Board's decision was arbitrary and capricious, and therefore it violated principles of due process as guaranteed by the Fourteenth Amendment. Alacare's primary objection to the Board's decision lies with the Board's approval of Baptist's application over Alacare's application using inconsistent criteria as compared with contemporaneous decisions. It is the right to be compared fairly with its competitor by a Board using consistent, fixed standards that Alacare contends was violated by the Board.

A. Protected Interest at Stake

In order to demonstrate a violation of due process principles, an individual must first show evidence of a constitutionally protected interest in life, liberty, or property, and next that there exists some governmental deprivation of that interest. *Bank of Jackson County v. Cherry*, 980 F.2d 1362, 1366 (11th Cir. 1993) *cert. denied*, —— U.S. —— (1993).

The proposition that an individual possesses a right to due process in the deprivation of a property interest is long-standing in the area of due process jurisprudence. *Perry v. Sindermann*, 408 U.S. 593 (1972); *Speiser v. Randall*, 357 U.S. 513 (1958); *Bd. of Regents v. Roth*, 408 U.S. 564 (1972). There is no precise model for a property interest, but such an interest extends beyond "actual ownership of real estate, chattels, or money." *Roth*, 408 U.S. at 571-72. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.*, 408 U.S. at 577.

In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982), the Supreme Court said:

> The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law [or federal law, as the case may be], which cannot be removed except 'for cause". Once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible, relating "to the whole domain of social and economic fact."

(citations omitted). In *Thompson v. Bass*, 616 F.2d 1259, 1264 (1980), the former Fifth Circuit hammered home the proposition that a state employee "whose employment may be terminated only for cause has a prop-

erty interest [at stake] and is entitled to due process protection." The important element here is that if the individual can only be deprived of an interest *for cause*, a property right is created. That concept applies to all benefits that require "cause" before they can be removed by the government.

There is no contention by Baptist, nor any finding by the courts below, that Alacare has no property right at stake. The right to a hearing before one can be denied an interest to which one is entitled is a well settled notion. Here, the statutory scheme imposes a hearing for all entities interested in receiving the CON award; Alacare and Baptist were the two entities which participated in that hearing before the Board. As competing CON applicants, they are entitled to consideration before the Board. However, Alacare contends that it is entitled to something more as well, which is the right to a fair impartial hearing with fixed standards for approval, instead of the arbitrary, inconsistent standards used by this Board in denying Alacare's CON. That entitlement is the protected interest at stake in this cause; it was properly protected by the fair hearing officer upon appeal and within the scope of his authority when he properly granted Alacare the CON.

B. Arbitrary Government Deprivation of a Protected Interest

Due process principles command that no one shall be deprived of a liberty interest unless the government has borne the burden of producing the evidence and convincing a fact finder of guilt. *Speiser*, 357 U.S. at 526. The courts must look not only to the weight of the individual's interest, but must also look to see whether the nature of the interest is one contemplated by the "liberty or property" language of the Fourteenth Amendment. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

The former Fifth Circuit most succinctly ruled upon the lack of consistent standards to which the petitioner objects in the case of *Frozen Foods Express, Inc, v.*

United States, 535 F.2d 877 (5th Cir. 1976). In that decision the court stated, as follows:

> . . . [L]aw does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. *There may not be a rule for Monday, and another rule for Tuesday, a rule for general application, but denied outright in a specific case.* 535 F.2d at 880 (citations omitted) (emphasis added).

In the final stage of the administrative agency's review, at the fair hearing, Hearing Officer Mark D. Wilkerson, properly and within the scope of his authority, concluded that the CON Review Board's decisions were unreasonable, arbitrary and capricious, and due to be set aside. A-62a. The fair hearing officer found that the hearing process failed to extract necessary evidence to support the Board's award of the CON to Baptist, since based on the record there was no evidence to support the finding that granting the Baptist application would improve the accessibility of service. A-62a. That single criterion, however, had it been found by the Board, still would not have been enough to justify the award of a CON to Baptist. Section 22-21-264 of the state code lists several factors which *must* be considered in the CON granting process, not the least of which is that of costs of services, expenditures, construction, and of overall financial feasibility of the proposal. § 22-21-264 *Ala. Code* (1975). A-79a. The hearing officer found that Alacare's charges were indeed lower than those of Baptist, and that fact distinguished the proceeding at issue from the three CON hearings held immediately prior. In the three prior hearings, the Board had most heavily considered cost factors in awarding the CONs, and in those three counties where Alacare also had competitive CON applications at stake, Alacare was denied CONs. Alacare was denied any of those CONs for allegedly not being the "most appropriate applicant" due to higher cost factors.

When inconsistent determinations are made by an administrative agency, an issue arises as to whether the

agency acted in an arbitrary and capricious manner. *See, Ex Parte Shelby County Medical Center, Inc.*, 564 So.2d 63 (Ala. 1990). In the instant case, the Board made three determinations regarding CONs on the same day that it made the determination here at issue. In those determinations, the Board used lower cost as its sole consideration in approving the CON applications in three other counties, in favor of other applicants. Curiously, in the present case, the Board denied Alacare's CON in favor of Baptist's CON where Alacare is clearly the more cost effective applicant. It is that act which Alacare contests, as the Board arbitrarily emphasized different criteria in one out of four hearings.

Baptist contested the final agency ruling, by Fair Hearing Officer Wilkerson, that the action of the fair hearing officer in denying Baptist's CON application and granting Alacare's CON was in fact arbitrary and capricious and due to be overturned. Alacare argued that the final agency ruling was correct and could not be overturned without a finding that the decision was clearly erroneous in view of the whole record. Alacare contended that the Board decision was clearly erroneous, as that decision did not take into account the lower proposed cost structure of Alacare, although it had considered that standard foremost in approving three other applicants competing against Alacare in different counties, all of whom had lower costs than Alacare.

The Board essentially ignored information regarding proposed charges and the comparative cost of the projects as between Alacare and Baptist, although those criteria were weighed exclusively in the granting of the three prior CONs. The Board cannot properly raise accessibility as its primary decisional factor in the comparison of Baptist and Alacare, where cost was the primary concern in three other decisions made the very same day. It is thus Alacare's contention that the Board violated Alacare's right to due process in its use of a different set of decisional criteria in that case, where in prior decisions the Board

consistently was concerned with cost factors. Had the Board considered and weighed cost factors heavily as per its usual procedure, the Alacare CON would have been granted as the more appropriate over the Baptist application.

The substantive protections afforded by the due process clause of the Fourteenth Amendment are designed to protect the individual from the "arbitrary exercise of the powers of government." *Hurtado v. California*, 110 U.S. 516 (1884). This Court has consistently and frequently affirmed the notion of substantive due process rights as a check of unreasonable government action. *See, Collins v. Harker Heights, TX*, 117 L.Ed.2d 261, —— U.S. —— (1992). As the *Frozen Foods* court stated, "an agency of government cannot deny one a benefit and then grant it to another on a case-by-case basis without applying standards, since to do so would be to act arbitrarily and capriciously." 535 F.2d at 880; *see also, Pritchett v. Nathan Rodgers Const. & Rlty. Co.*, 379 So. 2d 545 (Ala. 1980). That contention is the crux of the petitioner's argument.

Although the courts below held that the Board's initial denial of Alacare's CON was not an arbitrary or capricious decision, even the SHPA Rules seem to indicate a different result. Many of the rules appear to be weighted in favor of preference to existing facilities, particularly those which are also less costly and operate well. Section 410-1-6 concerns the review criteria and standards used by the Board in assessing which are "the most appropriate applicants" for CONs. § 410-1-6, SHPA Rules. A-88a. Section 410-1-6-.04(a) states that existing facilities may be afforded priority consideration in awarding CONs, as alternatives which would be less costly and/or more efficient than a proposed facility. SHPA Rules. A-88a. The rule at § 410-1-6-.04(b) discusses the weighing of lower costs versus greater accessibility. A-88a. SHPA rule § 410-1-6-.06(1)(e) states that the Board should consider the effect that the proposed facility might have on the

existing facility. A-89a. Rule § 410-1-6-.06(1)(e)(1) expressly states that expansion of existing facilities may be viewed with greater favor than establishment of new services; the considerations of accessibility and availability of services, although mentioned, take a secondary posture in this particular section. A-90a. And § 410-1-6-.17 adds the quality of past services as a consideration for the Board. A-91a.

Although petitioner Alacare is preferentially affected by all of its aforementioned rule sections, the Board still managed to alter the "fixed standards" to a degree which defeated every advantage that Alacare possessed over Baptist in the instant case. Since clearly the standards themselves did not change, petitioner contends that the emphasis which the Board placed upon those rule sections provided the force which altered the logical result of the CON award. And although the courts below held that it is within the Board's discretion to balance the competing interests, the arbitrary manipulation of laws to suit the interest of government violates the principles of the due process clause of the Fourteenth Amendment. As this Honorable Court recently reaffirmed, "the Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing [its] power. . . ." *Collins,* 117 L.Ed.2d at 274. (quoting *Deshaney v. Winnebago County Dept. of Social Services*).

If the Board were allowed to review each applicant for a CON based on a different set of priorities, the lack of uniformity alone would arguably create a constitutional violation, whereby similarly situated applicants would necessarily receive dissimilar treatment under differing standards of review. Were the Board given free reign to balance the criteria as it chose, the very situation that the substantive due process principles seek to avoid would arise, with a case-by-case inequitable, constitutionally infirm set of "standards" randomly applied by the state agency. Petitioner Alacare contends that this very situation has arisen in the present case, and that

the Board's arbitrary and capricious, haphazard application of the SHPA standards and state statutes violates the petitioner's interest in uniformly, fairly applied, reasonable standards for awarding CONs, as set out in the Alabama code, 22-21-260, *et seq.*, and the SHPA rules. The fair hearing officer acted within the proper exercise of his statutory and regulatory authority in his review of the Board's rulings. That fair hearing decision is the *final* decision of the agency and should be reinstated by this Court. § 22-21-275(14) *Ala. Code* (1975); § 410-1-8-.24, SHPA Rules (1994). *See*, A-86a and 93a, respectively.

CONCLUSION

For the foregoing reasons, the petitioner requests that this Honorable Court grant this petition for writ of certiorari.

Respectfully submitted,

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Date: May 4, 1995

APPENDICES

APPENDIX A

ALABAMA
COURT OF CIVIL APPEALS
OCTOBER TERM, 1993-94

AV92000673

ALACARE HOME HEALTH SERVICES, INC.

v.

BAPTIST HOSPITAL OF GADSDEN, INC.

Appeal from Etowah Circuit Court
(CV-92-695)

THIGPEN, Judge

This case involves competing applications for a certificate of need (CON).

Baptist Hospital of Gadsden (Baptist) and Alacare Home Health Services (Alacare) each applied to the State Health Planning Agency (SHPA) for a CON for authority to establish and operate home health services in the same service area. Only one application could be approved. Initially, the SHPA CON Review Board (Board) approved Baptist's application. Alacare subsequently requested a fair hearing, pursuant to Ala Code 1975, § 22-21-275(14). The hearing officer reversed the Board's decision and approved Alacare's application. Pursuant to Baptist's petition for judicial review of the hear-

ing officer's decision, the trial court reinstated the Board's original decision to award the CON to Baptist. Alacare's post-judgment motion was denied. Hence, this appeal.

The dispositive issue on appeal is whether the trial court erred in reversing the hearing officer's decision to award the CON to Alacare and reinstating the Board's decision to award the CON to Baptist.

Initially, we note that a decision by a state agency is presumed to be correct and will be affirmed unless it is arbitrary or capricious or fails to comply with applicable law. *State Health Planning & Resource Development Administration v. Rivendell of Alabama, Inc.*, 469 So. 2d 613 (Ala. Civ. App. 1985). The decision of the fair hearing officer is the final decision of the Board. Ala. Code 1975. § 21-22-275(14); *Methodist Homes for the Aging Corp. v. Stewart*, 594 So. 2d 161 (Ala. Civ. App. 1992). Further, this court reviews the trial court's ruling with no presumption of correctness, "since that court was in no better position to review the order of the Board than we are." *Rivendell* at 614.

The fair hearing officer's scope of review is limited to: (1) whether the CON application satisfies the statutory requirements; (2) whether SHPA made an arbitrary or capricious decision, or abused its discretion in deciding among competing applications; or (3) whether SHPA materially failed to follow the review procedures and made a substantial error. SHPA Rules and Regulations § 410-1-8-.22(1)(a). The fair hearing officer is prohibited from considering, inter alia, "the correctness, adequacy, or appropriateness of the criteria, standards or plans by which the application was measured," and from substituting his judgment for SHPA's factual findings. SHPA Rules and Regulations § 410-1-8-.22(1)(b)1.; see also § 410-1-8-.25(3). The criteria for a CON include availability and advantages of alternatives; need for the project; population statistics and growth; effect on exist-

ing facilities or services; expansion of existing services being favored over the establishment of new facilities; community reaction; access to medically underserved groups; and, whether the project complements and supports the existing health care system. SHPA Rules and Regulations §§ 410-1-6-.04 to -.08; see also Ala. Code 1975 § 22-21-264.

In its ruling approving Baptist's CON application, the Board specifically noted that neither capital costs nor new construction was required for Baptist. In determining that Alacare was not the most appropriate applicant, the Board specifically noted, inter alia, that capital costs for Alacare were approximately $9,000. The Board further noted that issuing the CON to Baptist should not affect other providers because the area was underserved. Testimony at the public hearing also revealed that Baptist had an approximately 80-year history in the health care field in Etowah County. The Board's ruling also expressly noted that Baptist proposed higher charges than those proposed by Alacare, and that Alacare had approval to operate home health services in several Alabama counties.

It appears of record that an important factor in the hearing officer's decision to reverse the Board's decision was the fact that Baptist proposed somewhat higher charges than Alacare; however, the hearing officer also concluded that the Board was justified in determining that approval of Baptist's application "would improve accessibility of such services by ensuring the availability of less costly alternatives to in-patient care" and "the grant of [Baptist]'s application would improve the accessibility of services in the area." It appears to this court that the Board gave considerable weight to the accessibility factor over the cost factor, and that the hearing officer impermissibly considered the appropriateness of the cost factor. In view of the Board's recognized expertise regarding CON approval, the weight assigned to the evidence pre-

sented to the Board is within the Board's discretion. *Health Care Authority of the City of Huntsville v. State Health Planning Agency*, 549 So. 2d 973 (Ala. Civ. App. 1989). The hearing officer is prohibited from considering the appropriateness of the criteria by which the application was measured. SHPA Rules and Regulations § 410-1-8-.22(1)(b). Therefore, we find no error in the trial court's determination to reinstate the approval of the application for a CON filed by Baptist.

AFFIRMED.

Robertson, P.J., and Yates, J., concur.

APPENDIX B

IN THE CIRCUIT COURT OF
ETOWAH COUNTY, ALABAMA

Civil No. CV-92-695-WHR

BAPTIST HOSPITAL OF GADSDEN, INC.,
an Alabama nonprofit corporation,
Plaintiff,

vs.

DERRELL O. FANCHER, ETC., *et al.*,
Defendants.

MEMORANDUM OPINION

I. INTRODUCTION

This case is before the Court upon a review of the administrative record, as supplemented, regarding two Certificate of Need ("CON") applications filed with the State Health Planning Agency ("SHPA") by Baptist Hospital of Gadsden, Inc. ("Baptist") and Alacare Home Health Services, Inc. ("Alacare"). Both applicants sought approval from the health regulatory agency for authority to establish and operate home health services in the Etowah County, Alabama, service area. Because the applicants were subjected to a "comparative review" under applicable SHPA procedures, only one of the two applicants could be approved for the service. The approval of one of the applicants, of necessity, results in the denial of the other.

The facts associated with the Petition for Judicial Review have their origin in certain public hearings conducted in Montgomery on December 3, 1991, before the

Certificate of Need Review Board ("CONRB") of the SHPA. In those hearings, the Board approved the Baptist plans to establish and operate a home health agency in Etowah County. The decision of the CONRB came following the reception of relevant testimony and evidence from Baptist, under SHPA Project No. AL-91048, and a similar presentation of testimony and evidence from another home health applicant seeking CON authority, Alacare, which was proceeding under the aegis of SHPA Project No. AL-91090.

At the conclusion of the hearing, Board member Hannah Brock moved to approve SHPA Project No. AL-91048 (Baptist) and to deny SHPA Project No. AL-91090 (Alacare). The motion was duly seconded by Board member Jim Purcell and it carried by a vote of three (3) to two (2). Accordingly, the Baptist project was deemed approved because a quorum of the CONRB, by a majority vote of the members voting, had indicated their support for the Baptist project and their rejection of the Alacare project. Section 410-1-8-.05(1) of the SHPA *Rules and Regulations (Rev. 1991).*

The decision of the Board was later subjected to a "Fair Hearing" review [Section 22-21-275(14) of the *Code of Alabama 1975*] and a hearing examiner was duly appointed and chosen to handle the case. The parties agreed that the issues would be decided by the hearing officer based on the administrative record and written pleadings and briefs. Following the filing of such documents, and a consideration of the record of the proceedings, the hearing officer issued a nine (9) page "Final Order" in the matter on or about May 28, 1992, totally reversing what the nine-member CON Review Board had decided. The result reached by the hearing examiner was *denial* of the Baptist CON application and the *approval* of the Alacare CON application.

It is that decision of the "Fair Hearing" which forms the basis of the Petition for Judicial Review filed herein

by Baptist Hospital. For the reasons which follow, the Court finds that the hearing examiner acted beyond his authority in taking the action complained of in this appeal. Baptist, therefore, is entitled to a nullification of the decision rendered by Mr. Wilkerson and a reinstatement of the initial decision of the CON Review Board.

II. FINDINGS OF FACT

A. *Initial Procedural History of the Case*

This Certificate of Need case deals with the health planning and development regulatory scheme under which all Alabama health care facilities and providers operate.

The State Health Planning Agency ("SHPA") is an agency of the State of Alabama which is currently designated as the sole state health planning and development entity. It administers the state Certificate of Need ("CON") program. A "CON" is a state approval or permit required by law before any person or entity may acquire, constuct or operate a new institutional health service or facility in Alabama. Section 22-21-260 *et seq.* of the *Code of Alabama 1975*. It is a violation of state law for any new institutional health service or facility to be offered or developed in Alabama in the absence of CON approval therefor.

Generally speaking, applicants for CON approval initiate their request for SHPA review by the filing of a "Letter of Intent" or "LOI" with the state agency. Section 410-1-7-.05 of the SHPA *Rules and Regulations (Rev. 1991)*. The LOI must be submitted by the applicant at least thirty (30) days prior to submission of a formal CON application, and is designed, essentially, to place the SHPA and other interested parties on notice that the applicant intends to seek state authority for the offering or development of a new institutional health service or facility.

Acting on behalf of Baptist, Robert J. Corey, Executive Vice President for Baptist Memorial Hospital, Gadsden, filed such a Letter of Itent on or about February 5, 1991. (Baptist Record at p. 03). In timely fashion, on or about March 22, 1991, Baptist filed its actual Certificate of Need application with SHPA. (Baptist Record at pp. 04-33). Section 410-1-7-.05(1) of the SHPA *Rules and Regulations (Rev. 1991).*

In similar fashion, Alacare Home Health Services, Inc. ("Alacare") filed a Letter of Intent with SHPA for the provision of home health services in the Etowah County service area. The LOI was subsequently followed by the filing of a CON application on or about March 29, 1991. (Alacare Record at pp. 06-51). Both Alacare and Baptist sought SHPA approval for the offering of home health agency services in Etowah County, Alabama.

Under SHPA practice and procedure, a review mechanism known as "batching" is employed in the processing and determination of CON applications "pertaining to similar types of services, facilities or equipment affecting the same health service area." So-called "batch eligible projects" are defined as those "facilities, services and equipment which are finite in number (such finite number being greater than zero) as defined by the State Health Plan." Section 410-1-7-.19(2) of the SHPA *Rules and Regulations (Rev. 1991).* Because Baptist and Alacare both proposed to offer home health services to residents of the Etowah County, Alabama, health service area, SHPA determined that the applications should be "batched" or "comparatively reviewed" by the CON Review Board. Under such procedure, the CONRB members hear all of the relevant testimony and evidence on both CON applications prior to making decisions on either application. No action is taken on any application being "comparatively reviewed" with some other application until the Board first has the opportunity to hear and evaluate all the relevant testimony and evidence. This

includes oral presentations by live witnesses; the CON applications themselves; the SHPA Staff Reports on all "batched" applications; the documentary evidence supplied by the parties and any legal authorities or arguments which the applicants, or their counsel, may decide to present to the Board for its consideration.

After the two applications were "batched" for review by the CONRB, along with an application filed by a third party, ABC Home Health of Alabama, Inc. ("ABC"), ABC requested that the applications be reviewed under the so-called "contested case proceedings" provisions of the SHPA regulations and the Alabama Administrative Procedure Act, Section 41-22-1 *et seq. Code of Alabama 1975*. SHPA's Executive Director assigned the projects to a hearing officer for a contested case hearing, pursuant to such request of ABC. On or about November 20, 1991, counsel to ABC withdrew its intervention and its request for "contested case" proceedings before the hearing examiner. (Alacare Record at p. 109). In response, hearing examiner Mark Montiel cancelled the "contested case" proceedings and remanded the remaining two applications (e.g., Baptist and Alacare) to the CON Review Board for a comparative review. (Alacare Record at p. 111). The project proposed by ABC was ultimately withdrawn altogether from SHPA consideration, by Notice of Withdrawal filed on or about November 25, 1991. (Alacare Record at p. 183).

The CON applications of Baptist and Alacare were scheduled for consideration at the regular meeting of the CON Review Board on or about December 3, 1991. At that public hearing, all the relevant testimony and evidence presented by both applicants was received and considered by the CON Review Board. Following the reception of all the testimony and evidence on both applications, the Board voted to approve the Baptist application (SHPA Project No. AL-91048) and to deny the Alacare application (SHPA Project No. AL-91090). (Alacare Record at pp. 153-158).

On or about December 23, 1991, Alacare filed a Request for Reconsideration with SHPA. Under that request [See: Section 410-1-8-.09 of the SHPA *Rules and Regulations (Rev. 1991)*] Alacare sought a review of the majority decision with respect to both the Baptist and the Alacare projects. (Alacare Record at pp. 139-147). At the public hearings conducted by SHPA on January 14, 1992, the CON Review Board, having a quorum present, did not determine by a majority vote of a quorum of its members present that "good cause" had been shown by Alacare which would justify granting reconsideration. (Alacare Record at p. 165). Accordingly, by operation of law, the Alacare Request for Reconsideration was deemed denied as of January 14, 1992. Section 410-1-8-.14 of the SHPA *Rules and Regulations (Rev. 1991).*

On or about January 23, 1992, Alacare filed its Request for Fair Hearing with SHPA. Section 410-1-8-.16 of the SHPA *Rules and Regulations (Rev. 1991)* and Section 22-21-275(14) of the *Code of Alabama 1975.* (Alacare Record at p. 164). John Beard, who is an attorney and who is also Executive Director of Alacare, filed the petition for Alacare "in its capacity as applicant in AL-91010 and as an Intervenor in AL-91048." Specifically, Alacare sought Fair Hearing review of the "adverse determination in the matter of [the Alacare application] and the granting of a CON [in favor of Baptist]." (Alacare Record at p. 164). Under the CON statute itself, a Fair Hearing is a further administrative remedy available to "applicants" with regard to "adverse decision[s]" by SHPA. Section 22-21-275(14) of the *Code of Alabama 1975.* Clearly, the statute provides that Alacare had the right to seek a Fair Hearing review with regard to its own application's *denial* but the language is absolutely silent with respect to whether Alacare had a simultaneous right to seek a Fair Hearing with regard to the Baptist application's *approval.*

In any event, whether Alacare had a clear legal right to oppose the Baptist approval and seek Fair Hearing

review of the same, the administrative record makes clear the fact that, by Joint Stipulation entered into on or about the 13th day of March, 1992, Alacare and Baptist stated that "all opposition to, and intervention in, either project by either party are hereby withdrawn." (Baptist Record at p. 145). The parties encouraged the Fair Hearing Officer to approve both applications for home health services, on the basis that "the need for home health services in Etowah County will adequately support approval of both projects." Nevertheless, by means of a decision on April 22, 1992, Fair Hearing Officer Mark Wilkerson opined that "granting of two applications in Etowah County would be in violation of [SHPA] Planning Policy 5 and is, therefore, beyond the Board's authority, notwithstanding the fact that all parties to the Fair Hearing are agreeable to such a stipulation." (Baptist Record at p. 151). Based on such finding, the Fair Hearing Officer refused to approve both applications and a suggested remand order supplied to him by counsel to the parties. The determination by the Fair Hearing Officer that two projects could not be approved in Etowah County had no effect whatsoever, however, upon the withdrawal of any further "opposition to, and intervention in, either project by either party." Such stipulation remained unaffected by the Fair Hearing Officer's refusal to approve both projects and the stipulation was never rescinded or nullified by any action by either Baptist or Alacare.

Despite the filing of the withdrawal of any further opposition to the Baptist approval, the Fair Hearing Officer proceeded to judgment under the Fair Hearing Request filed by Alacare. He ordered the parties to file briefs on their respective positions in the matter and, by written order dated May 28, 1992, Fair Hearing Officer Wilkerson totally reversed the decision which had been rendered by the SHPA's CON Review Board. The ultimate outcome of the decision was to deny the Baptist application and approve the Alacare application. (Baptist Record at pp. 198-207).

A timely Notice of Appeal, with appropriate Security for Costs, was then filed on behalf of Baptist by its legal counsel. (Baptist Record at pp. 217-220). On or about July 22, 1992, the Petition for Judicial Review was filed with the Clerk of the Circuit Court of Etowah County. (Baptist Record at pp. 221-231).

B. *Relevant Substantive Facts*

The Court is constrained to note that the facts relevant to its disposition of this matter are not in dispute. In view of the fact that this matter must be decided by the Court on the administrative record certified by the State Health Planning Agency, there is no additional testimony or evidence (save that filed by way of supplementation by Bapist) which this Court need consider. The decision, moreover, turns upon an application of the law to the facts rather than upon some determination of which disputed facts may be correct and which may be incorrect. Said another way, this Court is reviewing the same facts and record as the Fair Hearing Officer reviewed. Accordingly, there is no *ore tenus* presumption attending the findings of the administrative law judge. See, e.g., *Vann Express, Inc. v. Bee Line Express, Inc.*, 347 So.2d 1353 (Ala. 1977); *Harbin v. Alabama Public Service Commission*, 474 So.2d 63 (Ala. 1985). The Fair Hearing Officer did not hear live testimony and evidence; rather, he decided the case on the administrative record below and the arguments and authorities submitted by respective counsel to the parties.

Because the Fair Hearing Officer was obligated by regulation to simply review (1) whether the Baptist application's approval was consistent with applicable provisions of the State Health Plan; (2) whether SHPA acted in an arbitrary or capricious manner "without a reasonable justification for the decision or absent fixed standards against which the application was measured" and (3) if the agency "materially failed to follow [its] review procedures," the Court's review is a narrow one. Aside from

the issue of whether Alacare had standing to pursue a Fair Hearing decision in light of its withdrawal of further opposition to the Baptist project, the question before this Court is whether the Fair Hearing Officer exceeded his authority by reversing the CONRB's earlier findings.

In deciding whether the Baptist application met the requirements of the applicable sections of the Alabama State Health Plan, this Court considers the following facts, *viz:*

1. The findings contained in the written Ruling of the Certificate of Need Review Board (Baptist Record at pp. 153-154) are amply supported by the record evidence. Such findings include:

(a) The fact that there are no capital costs associated with the approval of this home health agency project;

(b) The fact that there will be no new construction associated with the approval of the application and the establishment and operation of the home health agency by Baptist Memorial Hospital;

(c) That charges are expected to be approximately $91.65 per visit for nursing; $82.74 for physical therapy; $94.77 for speech therapy; $90.19 for occupational therapy; $124.63 for medical social services and $52.98 for home health aide services;

(d) The fact that the total population to be served by this agency, in Etowah County alone, includes 106,875 (of which, 16,390 are age sixty-five or older);

(e) That this project should not affect other providers because, in accordance with federal law, all hospital patients who are in need of home health care have the right to choose any agency legally operating in Etowah County. Baptist has stated that it intends to emphasize services for its own patients and, in further support of its application's approval, noted that the State Health Plan indicates that the county is "underserved" even though both active providers have been in operation for many years;

(f) Some two hundred twenty six (226) patients were expected to receive seven thousand six hundred sixty (7,660) visits in 1992 and some two hundred twenty eight (228) patients were expected to receive seven thousand eight hundred twenty seven (7,827) visits in 1993;

(g) Baptist anticipates the following breakdown on payments for professional services: 7.6% of gross revenue will be self-pay; 53.5% will be Medicare; 4.4% will be Medicaid; 17.5% will be Blue Cross/Blue Shield of Alabama and 17.0% will be other insurance and

(h) SHPA Planning Policy 2 defines an "active provider" as an agency which holds a CON to serve the county and provides services to a minimum of 60 patients annually. There are two active and two inactive providers in Etowah County. SHPA Planning Policy 3 indicates that only statistical data generated by "active providers" will be used in a needs assessment in a particular health service area. SHPA Planning Policy 4 states that "any county below 3,000 visits and 90 persons served per 1,000 population 65 and older may be considered for an additional agency." Etowah County, by virtue of its 2,664 visits and 74.0 persons served per 1,000 population 65 and older is properly classified by SHPA as an "underserved" health service area.

2. Baptist has stated that it intends to provide, as mandated by SHPA Planning Policy 4, skilled nursing services; personal care; physical therapy; speech therapy; occupational therapy; medical social services and medical supplies. Additionally, Baptist Hospital will also provide respiratory therapy, enterstomal therapy and nutritional therapy on an "as needed" basis. (Baptist Record at p. 30).

3. Baptist currently operates a private-duty nursing service and, in the past, it has provided home health services on a contract basis for the Etowah County Health Department. An affiliated organization of Baptist Hos-

pital has provided speech therapy for both the county health department and another area hospital. All of the needed technical and clerical staffs, as well as administrative systems, are currently in place. These circumstances will enable Baptist to commence its home health operations with absolutely no new capital costs. (Baptist Record at p. 30).

4. A hospital-based home health agency, as contrasted with a freestanding service, offers the significant advantage of greater continuity of patient care. The planning of future home health care can often begin even before the hospital discharge occurs and in conjunction with the hospital care being received. Information and coordination between acute care nurses and physicians, and home health personnel, is much simplified when all are associated with the same organization. Indeed, the "continuity of care" issue is one that has been frequently raised by the Statewide Health Coordinating Council [See: Section 21-22-260(2) of the *Code of Alabama 1975*] and other health care organizations in Alabama. The Court finds from the evidence that such continuity of patient care is, for the most part, simply impossible for "outside" or freestanding agencies to maintain. (Baptist Record at p. 26).

5. Because there are only two "active" home health providers approved by SHPA for operation in Etowah County, there are not adequate specialty services in the area of home health. Such services should include speech therapy and occupational therapy. Baptist Health Services, the parent of Baptist Hospital, offers the only speech therapy services in Etowah County outside of the public school system. In addition, Baptist offers the only occupational therapy services in Etowah County. Therefore, approval of the Baptist CON application should greatly increase the accessibility and availability of such specialty services. The evidence demonstrates, based on a review of the diagnoses associated with the patients referred for home health services by Baptist Hospital, that highly

specialized services are needed for these patients and that Baptist will be equipped to provide such services. (Baptist Record at p. 25).

6. The vast majority of Baptist Hospital patients requiring home health services are Etowah County residents. All of these patients are presently being referred to outside agencies. While Baptist discharge planners and other hospital personnel work as closely as possible with the outside agencies, such arrangements can never be as effective—insofar as continuity of patient care is concerned —as working with an affiliated home health agency. Such care can only be maximized when the acute care provider is also the home health care provider. (The same is true when the home health patient requires admission, or readmission, to the acute care setting). (Baptist Record at p. 24).

7. Baptist Hospital presently operates a private-duty nursing agency which provides a much needed service to the community. The record shows that it is extremely difficult to continue to provide such a service because of financial constraints caused by the absence of Medicare reimbursement for this type of care. A Medicare-certified home health agency which would be part of the Baptist family of services, however, would be eligible for reimbursement. Such reimbursement could greatly assist in offsetting the financial deficit under which Baptist has provided certain services and it would insure that the private-duty nursing service can remain available and viable. Clearly, if Baptist were forced to cease offering private-duty nursing, there would be less competition in Etowah County for such service and the net effect would ultimately be an increase in costs for the residents of the health service area. (Baptist Record at p. 24). The Court notes the substantial contributions of Baptist Hospital to the community at large, and that the institution of this home health service at the institution will assist in reducing average lengths of stay in the acute care beds

of the hospital, ultimately resulting in reductions in costs within the overall health care delivery system. The control of unnecessary health care costs is one of the primary objectives of the health planning regulatory systems in Alabama.

8. Baptist has recognized experience in the delivery of home health services. Until relatively recently, Baptist was involved in the provision of a wide range of home health services to patients through a contract with the Etowah County Health Department. The contract was not renewed, at the option of Baptist, simply because of the inadequate payment system for such services. Baptist is known for its ability to deliver services, however, in this particular area of health care and the operation of its hospital-based home health service will not be "new" to Baptist in the sense that the hospital has provided similar care in previous years. (Baptist Record at p. 22).

9. The Court finds that the needs identified by Baptist coincide with the needs shown by the Alabama State Health Plan. The Plan indicates that home health services are most often utilized by persons 65 year of age and older. Baptist has a high percentage of patients this age. Over 53% of patients at Baptist Hospital are Medicare patients, with a median age of home referral typically being approximately 78 years. The average age of a referral is 73.5 years. (Baptist Record at p. 22). Approximately 90% of Baptist Hospital's home health referrals are patients above the age of 60; some 71% are above the age of 70. (Baptist Record at p. 21). There is no question about the existence of a large population of elderly persons who are in need of the services proposed to be offered or provided by Baptist under its home health agency proposal.

10. According to data from the State Health Plan utilized by Baptist at the time of its filing of its CON application, Alabama was experiencing a level of 3,241

home health visits per 1,000 population 65 years of age and older. There were 84.1 persons served per 1,000 population 65 and older. The State Health Plan's applicable section on home health states: "Since the vast majority of people receiving home health services are 65 years and older, this age group should be a consideration. Therefore, actual visits and persons served per 1,000 population 65 and older are the major consideration in identifying underserved areas. Counties falling below acceptable levels in both categories, for purposes of this [State Health] Plan, are considered underserved. These acceptable levels are 3,000 visits and 80 persons served per 1,000 population 65 and older, just below the state averages." The applicable State Health Plan shows that Etowah County had 2,664 visits and 74.0 persons served per 1,000 population 65 years of age and older. *These levels are well below the levels stated in the State Health Plan and indicate the need for the additional home health services proposed to be offered by Baptist under its CON application.* (Baptist Record at p. 19).

11. The evidence before the Court makes clear the fact that Baptist and its affiliated organizations and entities have a long history of providing high quality medical services in the Etowah County area. The application for the provision of home health is simply another effort on the part of Baptist to fill a gap in the health care continuum, and Baptist proposes to do so in a cost effective manner. For example, there are no approved occupational therapy home health services in Etowah County; Baptist Hospital, however, has an occupational therapist already on staff who is prepared to provide services when this CON is approved. Baptist is the largest hospital in Etowah County, both in terms of services and in terms of volume. Baptist is clearly capable of providing the resources and staff necessary for the provision of a high quality home health service. The record even demonstrates, according to the State Health

Plan statistics, that 57.6% of the Etowah County home health patients have been referred for services from Baptist Hospital. Baptist contends that because of the need for continuity of care; because of the need for the provision of high quality home health services; because approving Baptist would serve to best and most effectively utilize existing health care resources and because Baptist has a proven record of capability in the provision of the types of services it is here proposing, that it is the most appropriate applicant for SHPA approval under the relevant facts and circumstances. (Baptist Record at p. 18). The Court agrees with such contention.

12. Because of the fact that Baptist plans to emphasize and focus upon the provision of services, primarily, to its own patients, there is expected to be little or no detrimental impact upon existing providers. Current utilization levels should remain essentially unchanged, especially in light of the fact that the State Health Plan shows Etowah County is "underserved" even though both active providers have been in the market for many years. The other hospital provider in Etowah County should see little impact on its referral base because there is such a polarization among patients in the service area. Said another way, it is expected that the other hospital provider will continue to experience about the same level of utilization with or without approval of the Baptist project. Cross utilization between Baptist and its competitor is very low. (Baptist Record at p. 17).

13. Baptist has longstanding referral, linkage and transfer agreements with other health care providers both inside and outside Etowah County. This network will enable Baptist to maximize the potential of its home health agency much earlier than is true for the traditional "start-up" home health agency. (Baptist Record at p. 16).

14. Baptist contends, and the record supports the fact, that the option of approving another, freestanding,

home health agency for this CON authority is not an acceptable alternative. Problems already existing in the home health care delivery system will be made worse by such an approval; moreover, approval of a freestanding provider is simply not the optimal solution.

A hospital-based home health agency provides a level of care, and a continuity of care, that cannot be equalled in a freestanding setting. Once a patient is referred to an outside agency, the hospital provider must wait for the freestanding agency to come into the hospital to coordinate the provision of care. This can often cause a delay in discharging the patient, adding to already high costs of inpatient care and treatment. On the other hand, an agency affiliated with the hospital can coordinate this provision of care almost immediately. Patient and family education, needed in the home care setting, starts sooner. Visits by the specialized home care personnel—explaining future treatment plans for the patient—can take place long before discharge. This not only saves time, but it puts the patient and the patient's family at ease with respect to the "unknown" elements of such a program.

Baptist contends, and the record supports the fact, that it is the appropriate candidate for CON approval because it is in a position to initiate services more quickly and more economically than any other applicant or potential applicant. Speech therapy is already being provided by a Baptist affiliated entity and the only occupational therapist in the county has been employed by the hospital. As noted, Baptist has an extensive referral network; the administrative and technical staffs are already in place through the Baptist private duty nursing service and the prior experience of Baptist in the home health field is well documented. Baptist will incur no capital costs in starting this program since it already has a well established presence in Etowah County, with more than ample administrative space available for the operations. Physicians and residents in Etowah County are already aware

of the quality of care provided by Baptist organizations in the area and they appear quite comfortable with the ability of Baptist to operate this program in a responsible, professional and cost-effective manner. In short, Baptist meets all of the relevant criteria for CON approval on this project. (Baptist Record at p. 15).

15. Baptist Hospital is a not-for-profit hospital with a long and established history of providing high levels of indigent care. It has pledged to continue providing free care, with respect to home health, when this application is approved. (Baptist Record at p. 13).

16. The provision of home health services through Baptist Hospital is expected to enhance continuity of care; help reduce the cost of health care in Etowah County and improve the hospital's long term economic viability. Baptist is the appropriate applicant for CON approval in that it has a large Medicare patient population and a high home health referral ratio (to hospital discharges). A hospital-based agency, especially one in which the services systems currently exist, warrants approval over a start-up, freestanding, agency. A new agency would be more costly to establish and would be expected, ultimately, to result in higher health care costs for Etowah County residents. (Baptist Record at p. 56).

17. The health care reimbursement program, though in a state of potential flux under the Clinton administration's current plans for reform, militates in favor of approval of the hospital-based program. Medicare's Prospective Payment System ("PPS") is responsible for most of the "cost shifting" which occurs in hospitals today. This system is based on reimbursing a hospital a pre-determined or established amount for certain diagnostic categories ("DRG's"), regardless of the hospital's charges or costs. The average Medicare patient experiences a length of stay of 9.15 days. Medicare determines that the hospital will be reimbursed at an average, pre-set,

rate of $5,751 against total charges of, for example, $10,585. This pre-set or "prospective" rate is usually all a hospital will be paid by Medicare for the average patient.

There are at least two factors which impact upon the hospital's cost in caring for a Medicare patient: (1) the intensity of the services provided that patient and the resulting cost base and (2) the number of days the patient must remain in the hospital. If, for example, a hospital's actual daily cost for caring for a patient is $900 per day, the hospital's resulting cost is $8,190 for an average stay of 9.1 days. Medicare will reimburse only 5,751.00, leaving the hospital with $2,349 in actual costs unpaid by Medicare. This amount will either be absorbed by the hospital or passed on to paying patients (either individually or through their insurance) by means of higher patient charges.

By "shifting" losses from Medicare and bad debt to other payors, hospitals are able to continue operating in a highly regulated environment. However, the evidence is that such shifts result in higher health insurance premiums and increased health care costs for consumers, business and industry. Due to the impact of cost shifting on the overall cost of health care services, it has become apparent that acceptable methods to reduce or eliminate the practice of "cost shifting" must be found. The CON review process is designed in such a fashion as to be a part of the solution.

Retail businesses have considerable latitude in establishing methods for reducing losses. Hospitals, however, do not have many choices in how they can reduce the levels of "product loss" costs, which routinely occur with contractual allowances and bad debt. Various methods, such as utilization reviews, pre-admission qualification and a vigorous collection department, can go toward reducing a hospital's exposure and such policies have, generally, been implemented to the maximum extent practicable by hospitals.

The major contributor to the need for hospital cost "shifting" is the Medicare reimbursement system itself; Medicare patients are not at fault. It is thought that as few as ten to twenty percent of all Medicare patients are responsible for as much as eighty percent of hospital losses from prospective reimbursement. These are Medicare patients whose admissions have resulted in a cost or length of stay "outlier" status. This means, in effect, that their cost, length of stay, or both, are greater than Medicare allowances under the PPS system of hospital reimbursement.

The evidence makes clear that the key to reducing such losses is found in implementing methods which insure greater Medicare reimbursement for these patients. One such method is to establish a Medicare-certified home health agency. Such an entity permits the hospital to obtain cost-based reimbursement for visits and, simultaneously, provides legitimate opportunities for allocating existing general and administrative expense and depreciation to the agency.

By obtaining greater reimbursement from its Medicare patients, and by obtaining a more effective distribution of operating expenses, a hospital is able to more effectively control costs, thereby reducing or slowing the need to "shift" costs to other payors. The approval of the Baptist home health proposal, the Court finds, will greatly assist Baptist in its reimbursement program, thereby benefitting all the persons of the health service area who are served by the provision of care at Baptist Hospital and its affiliated entities. (Baptist Record at pp. 53-56).

18. The Alabama Department of Public Health voiced no opposition to the approval of the Baptist home health application, even though home health services are provided through the county health department in Etowah County. Indeed, the State Health Officer stated: "The [Alabama Department of Public Health] has enjoyed a good working relationship with Baptist Memorial Hos-

pital. We will continue to work with [Baptist] in the future to ensure the best possible care for . . . patients." (Baptist Record at p. 58).

19. Section 22-21-260(2) of the *Code of Alabama 1975* provides that the Statewide Health Coordinating Council ("SHCC") is empowered to "advise the State Health Planning [Agency] on matters relating to health planning and resource development." In its capacity as "advisor" to the CON Review Board, the SHCC has adopted the following resolution:

> BE IT RESOLVED BY THE STATE HEALTH COORDINATING COUNCIL OF ALABAMA that it fully supports and endorses care coordination and cooperation between the Alabama Department of Public Health and entities applying for a home health Certificate of Need.
>
> BE IT FURTHER RESOLVED that it is the sense of the State Health Coordinating Council that in considering applications for Certificates of Need to operate home health agencies, the Certificate of Need Review Board and the State Health Planning and Development Agency should consider whether such entities have entered into a co-operative arrangement with the Department of Public Health as contemplated by the above agreement and, if such an arrangement has been entered into, that the arrangement should be considered as evidence in favor of the application because it shows evaluation and consistency of the proposed change in service with the facility's and the community's overall health plan, as provided by Ala. Code Section 22-21-264(4)(c). (Emphasis added).

By means of such resolution, the CON Review Board has been advised by the Alabama SHCC that it should accept as favorable evidence the cooperative efforts of Baptist Hospital of Gadsden, Inc., and the Alabama Department of Public Health. (Baptist Record at pp. 58-

59). The Court does so, noting that there is no evidence to the contrary to the record.

20. The SHPA Staff Report, prepared by the professional reviewers at the agency, notes that since the implementation of the "DRG" system of reimbursement went into effect, more and more patients are being discharged earlier and earlier from acute care hospital facilities. Coupling the earlier discharges with the anticipated growth of the population in the relevant health service area, the SHPA Staff Report further underscores the need for additional home health services in Etowah County. The report states: "Baptist Hospital needs the opportunity to develop a continuum of care for its patients. On page 13 of the application, Baptist Hospital makes the assumption that large hospitals with larger service areas would have more home health referrals than hospitals smaller in size. [Baptist] also points out that [it] compares favorably to some of the largest hospitals in Alabama regarding the number of referrals." (Baptist Record at p. 90). While it is not the province of the SHPA Staff Report to "recommend" approval or denial of any particular application before the CON Review Board for consideration, the report makes it clear that the Board was authorized in approving the Baptist proposal under an application of the law and regulations to the relevant facts.

21. Approximately fifty percent of Baptist' patients fall into the Medicare category. Because of the cost-based reimbursement for hospital home health agencies under Medicare, coupled with the fact that there will be no additional recruiting of personnel; no building or acquisition costs; no additional administrative or support services costs and an overall reduction in costs of overhead by spreading the expenses over additional revenue, Baptist contends the project will be quite cost effective. The evidence supports such a contention. (Hearing Transcript at pp. 4-5).

22. While eighty percent of the home health referrals in Etowah County come from Baptist Hospital, Baptist does not intend to limit its services solely to Baptist patients. Additionally, the record demonstrates that Baptist is the only provider in Etowah County which is equipped to provide all the services described in the State Health Plan as necessary for maximum home health benefits, including skilled nursing; personal care; physical therapy; medical-social services and medical supplies. Baptist is also capable of providing all the necessary dietary, therapeutic, respiratory and enterostomal therapies needed by the patients it intends to serve. (Hearing Transcript at pp. 5-6).

23. As previously noted, Baptist is already providing extensive private duty nursing services. The staff currently in place is prepared to enlarge the responsibilities to include home health services. Personnel in charge of this department at Baptist have testified to the importance of patient care and continuity of service that this application be approved." If the family and patient choose our service, we [will] begin early in admission to provide the discharge plans for them; we feel that this encourages them and the physician to get an early discharge into home health care. We can follow that home health care from admission in the hospital to the home; many times, if they are sick enough to have to return to the hospital, then we can follow them back into the hospital without breaking or interrupting the service. If you're able to do that, we feel that the patient is better served, the quality of care is better and we just feel that with the loving, caring attention that the nurses can provide, going into the hospital with them, the families feel more secure and they are more confident." (Hearing Transcript at pp. 6-7). At the public hearing before the CON Review Board, Susan Easterwood, Supervisor of the Private Duty Department at Baptist Hospital, testified regarding the current operation of private duty nursing and how important it is to Baptist, and its patients, that this service be

expanded and enlarged to include home health services. (Hearing Transcript at pp. 7-8).

24. The evidence of record indicates the strong commitment of the Baptist organization to the provision of care to the citizens of Etowah County, even if that care must be delivered free of charge. Scott Hardee, Vice President of Baptist Health Services, spoke to the Board members and testified that during the year preceding the hearing, Baptist "wrote off around ten million ($10,000,000.00) dollars [in] indigent care.

"I feel like . . . we have a goal or a mission in Etowah County to serve the people. We currently have two agencies that are active in Etowah County. At this particular time, some of the needs in our county are not being met. One of those agencies, as recently as this week, we understand, [was] beginning to pull back and not take the patients due to a lack of staffing. At Baptist, as has already been indicated to you, we have the staff, we have the capabilities of taking care of the patients. As indicated earlier, we've been there for quite a while. We just feel . . . that we can do a good job in taking care of the patients in Etowah County." (Hearing Transcript at pp. 9-10). Evidence of record suggests that Baptist has experienced difficulties, through its discharge planning office, in placing patients in home health agencies in Etowah County due to a lack of adequate staffing. (Hearing Transcript at pp. 11-12).

25. The home health agency proposal of Alacare envisions an initial capital outlay of approximately nine thousand ($9,000.00) dollars, compared with a zero (0) capital outlay for Baptist. (Hearing Transcript at p. 12).

26. The "Fair Hearing" Officer sought to justify his decision in this case by noting that the CON Review Board had "implicitly found [in certain other CON cases] that the hospitals [seeking home health CON approvals], on the basis of charge data, were the lowest cost pro-

viders." (Baptist Record at p. 210). On the basis that the "charges" proposed by Baptist were somewhat higher than the "charges" proposed by Alacare—and, in essence, on that basis alone—he reversed the CON Review Board's decision in favor of Baptist. It is clear that the Fair Hearing Officer either did not understand, or that he purposefully ignored, the salient fact that an acute care hospital is paid only a "fixed" number of dollars for home health under the current federal reimbursement program. To that extent, then, the "charges" proposed by a hospital are somewhat irrelevant; it makes no difference that a hospital may "charge" $100 dollars for a service if the reimbursement for the service is capped at $50.

The record makes it quite clear that the CON Review Board is authorized to, and that it routinely does, consider many, many factors on home health applications other than, and certainly in addition to, "charge data." Charges are simply one of many different different criteria utilized in coming to a decision on which applicant, among competing applicants, is the most appropriate for CON approval.

In seeking approval for its CON application under Project No. AL-91090, Alacare emphasized its cost per visit data and compared it with statewide averages for the same or similar services. Yet the Court notes the following undisputed facts which support the approval of the Baptist Hospital application, *viz:*

(a) The proposal for the establishment of home health services by Baptist envisions no new capital costs on behalf of the Hospital;

(b) While SHPA's Planning Policy 7 favors the approval of home health applications proposed by or on behalf of "rural" hospital facilities, Etowah County is not classified as "rural" by the United States Health Care Financing Administration ("HCFA"). Therefore, the CON Review Board was required to act upon other planning policies and by an application of the normal review

criteria to the relevant facts, with no attendant presumption in favor of Baptist Hospital;

(c) Etowas County has been designated as an "underserved" area of the state insofar as home health services are concerned. Obviously, the Board concluded that Baptist Hospital was the more appropriate applicant to fill that need (rather than Alacare) because of such issues as continuity of care; the provision of health care services, free of charge, to indigent persons; the availability of needed hospital services for home health patients and the integrated continuum of patient care that a freestanding home health agency simply cannot provide;

(d) The CON Review Board is authorized, under its legislatively conferred review powers, to consider the fact that a public hospital-based home health agency is the only type of home health applicant which has the financial ability and incentive to render care to Medicaid and indigent populations. While freestanding home health agencies will lose money by providing such care, hospitals can significantly reduce their losses by providing home health care, at the earliest possible opportunity, instead of continuing expensive inpatient care beyond the time it is really indicated and

(e) Regional hospitals such as Baptist have many advantages over freestanding home health agencies. These include: (1) the ability to reduce hospital costs and thereby reach a greater number of underserved areas and patients; (2) access to substantial inpatient revenues, giving the hospital-based agency financial flexibility that is often lacking in a freestanding setting; (3) the strong employment of qualified health care professionals with a number of different skills, meaning that the health care made available to the patients is greatly enhanced over what is typically available in the freestanding setting; (4) the capability to become involved with IV therapy services, durable medical equipment, home respiratory care, home nutrition, pain management and other health

care fields related to support of the hospital's "core" business of inpatient and outpatient care and (5) the ability to strengthen the continuum of care for both the hospital and the home health patients because of the bridge which then exists between acute care and home care services;

It is clear to the Court that the administrative agency fact finders were very interested in review criteria beyond the "charge data" related to the cost per home health visit. While charges can (and should) obviously be considered, they are certainly not intended to be dispositive of the Board's decisions in cases such as this one. The Court, accordingly, cannot conclude that Alacare is entitled to prevail in this action simply (or even primarily) because of a comparison of "charge data" between the two applicants. Such a conclusion would constitute an "apples and oranges" type comparison.

III. CONCLUSIONS OF LAW

A. *Standard of Review*

This Court is reviewing a final decision of the State Health Planning Agency that comes to it from a "Fair Hearing Officer" rather than from the deliberations of the CON Review Board itself. See, e.g., Section 22-21-275(14) of the *Code of Alabama 1975*. Because of this fact, the Court must consider whether the Fair Hearing Officer exceeded his lawful authority, or abused his discretion, in coming to the decision he reached.

Under Section 410-1-8-.22 of the SHPA *Rules and Regulations (Rev. 1991)*, the primary purpose of the "Fair Hearing" procedure is clearly explained. The purpose is to determine whether the application meets the requirements of Section 22-21-266 of the *Code of Alabama 1975* (with respect to inpatient services or facilities) or, otherwise, whether the application "is inconsistent with the criteria and standards set out in these [SHPA] rules, and whether [the application's approval]

is consistent with the appropriate State [Health] Plan." The scope of the review by the Fair Hearing Officer is expressly limited to the following issues:

> (a) Whether the application meets the requirements of Section 22-21-266, *Code of Alabama*, 1975, with respect to inpatient facilities or services, if applicable, as well as whether the application is consistent with each of the applicable criteria and standards set forth in Chapter 6 of these Rules, and whether the application is consistent with the appropriate State [Health] Plan;
>
> (b) Whether the State Agency acted in an arbitrary or capricious manner, without a reasonable justification for the decision, or in the absence of fixed standards against which the application was measured, or whether the State Agency otherwise abused its discretion in deciding among competing applications;
>
> (c) Whether the State Agency materially failed to follow review procedures as set out in these Rules and whether the error was substantial in its effect. (Emphasis added).

Under that same regulatory provision, additional limitations are imposed upon the Fair Hearing Officers assigned to hear and decide CON cases. The following issues, by regulation, shall not be considered by the Fair Hearing Officer and shall be deemed "immaterial to the Fair Hearing" decision:

> (a) The correctness, adequacy or appropriateness of the criteria, standard or plans by which the application was measured; or
>
> (b) New evidence or argument, whether written or oral, which has not been considered by the Certificate of Need Review Board or Administrative Law Judge at any previous hearing, or

(c) The determination of whether the proposal is a "new institutional health service" subject to review by these Rules.

Under this limited standard of review, the Fair Hearing Officer is certainly not authorized to substitute his judgment for that of the nine-member CON Review Board and, in *ipse dixit* fashion, reverse and hold for naught the reasonable and supported determination of the initial hearing. If there is credible evidence in the administrative record supporting approval of the Baptist application, and if the CON Review Board is reasonably justified in having decided in favor of Baptist and against Alacare, the analysis is at an end. Clearly, there is not one iota of evidence pointing to abuse of discretion or that SHPA somehow materially failed to follow its review procedures. Accordingly, the decision of the Fair Hearing Officer was, itself, an abuse of discretion and beyond his authority.

Under decided Alabama case law, a decision of the CON Review Board must be affirmed by the Fair Hearing Officer upon review unless the decision was clearly erroneous or arbitrary and capricious. See, e.g., Section 41-22-20(k) of the *Code of Alabama 1975; State Health Planning Agency v. Mobile Infirmary*, 533 So.2d 255, 257 (Ala.Civ.App. 1988); *State Health Planning Agency v. Rivendell of Alabama, Inc.*, 469 So.2d 613, 614 (Ala. Civ.App. 1985); *Humana Medical Corporation v. State Health Planning Agency*, 460 So.2d 1295, 1297 (Ala. Civ.App. 1984). A decision of the CON Review Board cannot be deemed arbitrary or capricious if the decision is "reasonably justified" or based upon "fixed standards". See, e.g., *Health Care Authority of the City of Huntsville v. SHPA*, 549 So.2d 973, 975 (Ala.Civ.App. 1989).

Alabama law is further clear on the fact that a decision of the CON Review Board must be taken as "prima facie just and reasonable and [a] court shall not substitute its judgment for that of the agency as to the weight of

the evidence on questions of fact." Section 41-22-20(k) of the *Code of Alabama 1975; Rivendell of Alabama, Inc, supra; Humana Medical Corporation, supra; Health Care Authority of the City of Huntsville, supra.* This rule applies even to those cases where the testimony is generalized and the evidence meager or conflicting. Even when reasonable minds might differ as to the correct result, a substitution of judgment is not permitted. *Health Care Authority of the City of Huntsville, supra,* at p. 975. The Court finds that this same standard applies to the Fair Hearing Officer.

Obviously, the Fair Hearing Officer was in no better position to evaluate the testimony and evidence than this Circuit Court. He did not hear live witnesses and have the benefit of cross examination; rather, he simply reviewed the transcript of the proceedings before the CON Review Board and reviewed exhibits and arguments. Accordingly, it becomes even more clear that the Fair Hearing Officer went far beyond the acceptable bounds of his role as a hearing examiner when he absolutely rejected the reasonable determination of the CON Review Board on these two projects. Also, this Court should bear in mind that while the Fair Hearing Officer's decision must initially be treated by the Court as "just and reasonable" on its face, an application of the law to the facts is what reveals whether that presumption is overcome and nullified by the circumstances.

The evidence which was before the nine-member CON Board makes clear the fact that the determination in favor of Baptist, and adverse to Alacare, was reasonably justified. Because that is the case, *ergo,* the original ruling of the Board cannot be deemed "arbitrary or capricious." It must be affirmed and the "Fair Hearing" Officer's decision reversed.

B. *The Alacare Standing Issue*

A threshold matter, of some significance, is that of the standing of Alacare (or, better said, the lack of such

standing) to attack the approval of the Baptist CON application. As pointed out previously herein, Alacare and Baptist entered into a Joint Stipulation which was filed with SHPA and which forms a part of the administrative record in this appeal. Under and by virtue of that stipulation, both parties agreed that they were withdrawing any and all further opposition to the other applicant's CON approval. The stipulation, according to the copy of the record furnished to undersigned counsel, was never withdrawn by either party.

Clearly, the parties were attempting to find a settlement which would have permitted the approval of both CON applications. Certain findings of fact were agreed to, along with conclusions of law, and the same were submitted to the hearing examiner for his consideration. However, upon his review of the relevant regulatory schemes, the hearing examiner declined to enter what would have been, in effect, a consent judgment. Rather, he rejected the proposal that both Baptist and Alacare could be approved for home health services, finding that the CON Review Board would not have such authority even if he made such a recommendation.

The Court notes that the only aspects of the Joint Stipulation which were "rejected" by the hearing examiner had to do with certain legal conclusions and findings. Neither the parties to the stipulation, nor the hearing examiner himself, took any actions to withdraw, cancel, nullify or amend the remaining portion of the Joint Stipulation. It remains on file in this action today. Among other provisions, the parties agreed to withdraw further opposition to each other's application's approval. Under the circumstances, this means that Alacare waived its rights to attack the approval of the Baptist application.

Because Alacare withdrew both its intervention and its opposition to the Baptist application, Alacare cannot legitimately claim to have been "adversely affected" by SHPA's approval of the Baptist CON application. Since

Alacare withdrew its intervention and its opposition, and since, further, Alacare was not an existing Etowah County home health provider at the time of the filing of the Joint Stipulation or later, it is a legal impossibility for Alacare to claim proper standing to challenge the Baptist approval. Under those facts and circumstances, Alacare should be treated as a legal stranger to the approval originally granted to Baptist.

Under the circumstances, the appropriate action for the Fair Hearing Officer to have taken would have been to dismiss the Fair Hearing request on his own motion. Alternatively, the Fair Hearing Officer could have dismissed the request, or entered judgment in favor of Baptist, on the basis that there was no jurisdiction for him to act since Alacare had withdrawn its intervention and opposition. Having done so, Alacare was no longer legally interested in the outcome of the case which Baptist had before the CON Review Board.

This Court, upon review of the Joint Stipulation, finds and holds that Alacare waived any and all further rights to attack or challenge the administrative action on the Baptist CON application. Since Alacare, by its own pleadings, was no longer an intervenor or an opponent with regard to the Baptist application, it was a stranger to it. Accordingly, following the filing of the stipulation, there was no longer any basis upon which Alacare could complain about the Baptist project. They should have been reviewed on their own respective merits, if at all, by SHPA. Alacare had a right to request an administrative "Fair Hearing," therefore, with regard to its own application's denial but not with respect to the Baptist application's approval. See, e.g., Section 22-21-275(14) of the *Code of Alabama 1975* (Fair Hearing review available to "the applicant" with regard to its project's denial).

While the Court finds credible evidence supporting the Baptist argument of lack of standing on the part of

Alacare, it is unwilling to wholly invalidate the action taken by the SHPA in *setting* a Fair Hearing review between the applicants. Moreover, the standing issue is rendered moot, insofar as Baptist is concerned, by this Court's finding that the Fair Hearing Officer's decision must be reversed and the original CONRB decision affirmed. Insofar as that determination is concerned, the Court now addresses the merits of the original CON Review Board action in this matter.

C. *Conclusions as to Original Board Action*

The original decision of the full CON Review Board—rather than the decision of the Fair Hearing Officer—is the determination which this Court is prepared to uphold as and for the correct decision of SHPA. The original SHPA decision is well reasoned and supported by the testimony and evidence. The "Fair Hearing" decision is poorly reasoned and unsupported by the testimony and evidence.

According to the Alabama State Health Plan in effect at the time of filing of the Baptist application, Etowah County was an "underserved" area of our State. Therefore, according to the State Health Plan and SHPA (by means of the Staff Report), the Baptist project was susceptible to being approved by the CON Review Board. See, e.g., Alabama State Health Plan, Section 410-2-4-.04 (8)(d)(4). Indeed, the Board's original ruling specifically found that the Baptist project was consistent with the State Health Plan and that Baptist had demonstrated a community need for additional home health services. The Board further reasonably found that Baptist was the more appropriate applicant, as contrasted with Alacare, the freestanding provider. The SHPA Staff Report noted no inconsistency of the Baptist project with the applicable provisions of the State Health Plan and, additionally, specifically found Etowah County to be underserved in terms of home health services.

The Court notes that Alacare acknowledged these findings of SHPA and even acknowledged that Baptist was an appropriate applicant for CON approval. Moreover, Alacare was apparently so convinced that Baptist would be approved by the SHPA for home health that Alacare encouraged the CON Review Board and the Fair Hearing Officer to approve both the Baptist application as well as the Alacare application. When the matter went to the Fair Hearing Officer for review, following action in Baptist' favor by the CON Review Board, the single issue was whether the Board had acted arbitrarily and capriciously in selecting Baptist as the more appropriate applicant.

Alacare's contention to the Fair Hearing Officer was that it was the "more appropriate applicant" *simply because certain of its projected charges were lower than those projected by Baptist.* It contended that because this was the case, and because Alacare was proposing to "expand" its services into Etowah County, it should be approved.

It is without dispute, however, that facility charges are simply one of many considerations before the CON Review Board when it decides between competing CON applicants. SHPA's own regulations provide that the determination is "to be established from the evidence as to the ability of the person, directly or indirectly, to render adequate service to the public." Section 410-1-6-.09 of the SHPA *Rules and Regulations (Rev. 1991).* Among other things, the regulation states that this analysis must include professional capability; management capability and adequate manpower. The record is replete with the information provided to the Board, by Baptist, regarding its ability to render this health service and why it is a more appropriate applicant to provide the service than Alacare.

The evidence demonstrates that system-wide health care savings will occur if the CON authority is issued to

Baptist rather than Alacare. Hospital-based home health care is a less costly alternative to emergency or institutional health care, such as a hospital or nursing home. Patients are placed in lower cost settings where they can be provided necessary services which, in many cases, can prevent the patient's needing to be readmitted to the hospital. Such cost savings are especially important with regard to the provision of indigent care, since facilities such as Baptist have a proven history of rendering such care. Freestanding agencies such as Alacare have no economic incentive to provide any degree of free care and most provide little, or no, such care in the community.

There is no question but that Baptist will continue providing for indigent patients. As noted earlier, in one year alone, Baptist wrote off approximately ten million ($10,000,000.00) in indigent care. As a not for profit hospital, Baptist has a mission to serve all the people of the Etowah County service area, regardless of their ability to pay. The record demonstrates that, at the time of the decision, there were only two active providers in the county and one of them had ceased taking patients. Baptist has stated that it intends to meet that need, especially with regard to the poor. The role Baptist will play in the provision of home health will be a significant one, based upon the evidence, because moving indigent patients from the high-cost setting of an acute care hospital to a hospital-based home health agency will reduce costs over the entire health care delivery system.

Baptist already has the staff and equipment necessary to provide a high quality program of home health care. There will be no additional recruitment of staff; no building or acquisition costs and no additional administrative and support services costs. As noted in the application itself, there will simply be no capital costs associated with the approval of this project. Conversely, Alacare projects something under ten thousand ($10,000.00) dollars in initial costs for the establishment of its service.

The Court finds and concludes that Baptist has the necessary experience to provide the service. Until recently, Baptist provided home health services to patients through a contrast with the Etowah County Health Department. Additionally, Baptist operates its own private duty nursing service, providing services quite similar to those of a home health agency. Because of the private duty nursing already being offered in or through the Baptist system, all of the administrative systems, referral networks and staff requirements needed for home health are in place. All the necessary technical staff (such as nursing, speech pathology and physical and occupational therapy) are already employed by Baptist or by Baptist affiliated entities or organizations.

The Court notes, however, that Baptist may not be in a position to continue the provision of these services, due to financial constraints and considerations, as there is no Medicare reimbursement for many of its present services. Baptist expects it will be able to continue the services, however, if it is awarded CON authority for home health. Because the Baptist-based home health agency would help offset the financial impact of the private duty nursing service costs, it is reasonable to conclude that such service could continue with the approval of the home health application.

Baptist and its affiliated organizations have a long and well established history of providing only the highest quality medical services to the people of the service area. Physicians and residents of the Etowah County area are well aware of the quality of care provided by Baptist and they are confident in the abilities of the organization to render new and enhanced services. Baptist has a long-established referral, linkage and transfer system already in place with other health care providers. Such providers are located both within and without Etowah County proper.

In view of the fact that Baptist already has the staff and equipment required to provide home health services,

the necessary experience to provide or render the care and a long history of providing high quality medical attention to residents of the service area, and in further view of the fact that Baptist presently provides private duty nursing services similar to home health care, the granting of CON authority to Baptist is tantamount to an expansion of existing services rather than what is traditionally thought of as the establishment of a new institutional health service. Therefore, if priority consideration is to be given to any applicant, such consideration would be more appropriately given to Baptist rather than Alacare. Baptist has a presence and a history of service in Etowah County; Alacare does not. This Court finds this fact to be significant.

The evidence further supports the contention that a hospital-based home health agency will provide patients with greater continuity of care. Baptist has explained this, in its CON application, as follows. "The planning of future home health care can often begin before hospital discharge in conjunction with present hospital care being received. Information and coordination between acute care nurses and physicians with home health personnel is much simplified when all are associated with the same organization." Baptist contends, and the evidence supports, that a hospital-based agency can provide a level of continuity of care that hospital patients need. When a patient is referred to an "outside" agency, the hospital may have to wait for the agency to come to the hospital to coordinate the provision of services and transfer. This often results in delays in discharging the patient, which, in turn, adds unnecessary costs to the delivery of the care. A hospital-based home health agency, by contrast, can conduct the coordination almost simultaneously. Patient and family education, often needed in home health care settings, may start even prior to discharge. Therefore, Baptist expects to be in a position to begin providing home health care much more efficiently, and at substantially less cost, than Alacare. This is especially

important since some eighty (80%) per cent of the home health referrals from Etowah County come from Baptist Hospital and Baptist has experienced serious difficulties in placing patients with the existing home health agency providers.

Continuity of care is more easily, and more effectively, facilitated by a hospital-based home health agency than a freestanding agency. This is particularly true in those instances where the patient requires readmission to the hospital. This issue was addressed by Susan Easterwood, Supervisor of the Baptist Private Duty Nursing Department, at the public hearing, *viz:*

> If the family and patient choose our service, we begin early in admission to provide the discharge plans for them; and we feel that this encourages them and the physician to get an early discharge into home health care. We can follow that home health care from admission in the hospital to the home; many times, if they are sick enough to have to return to the hospital, then we can follow them back into the hospital without breaking or interrupting the service. If you're able to do that, we feel that the patient is better served, the quality of care is better, and we just feel that the loving, caring, attention that the nurses can provide going into the hospital with them, the families feel more secure and they are more confident.

Baptist is the only provider in the Etowah County service area that can provide all the home health services described in the State Health Plan. These include nursing care; personal care; physical therapy; medical social work and medical supplies. In addition, Baptist can provide dietary, therapeutic, respiratory and enterstomal therapies. Therefore, increased accessibility, continuity of care and quality of care will be insured by the approval of the Baptist, rather than the Alacare, application.

Baptist offers the only speech therapy services in Etowah County, outside the public school system, and the only occupational therapy services in the county. Therefore, home health CON authority in favor of Baptist will mean an increase in accessibility and availability of these specialty services which are not provided by the other home health agencies. Baptist has documented, and the evidence demonstrates, the high degree of need for these specialized services, and the Court has taken the same into account.

Home health services are most often utilized by individuals who are age sixty-five (65) or older. The SHPA data indicates that, for its size and utilization, Baptist has an unusually large number of patients in this age category who require home health care after discharge. Over fifty three (53%) percent of the patients at Baptist Hospital are Medicare patients. The median age of a home referral from Baptist was seventy eight (78) years in 1990. These patients have multiple health problems and are very much in need of specialized services.

In considering whether or not the CON Review Board was reasonably justified in making its decision in favor of Baptist and against Alacare, this Court has carefully considered the following review criteria of the SHPA and the applicability of each criterion to the Baptist application, *viz:*

> (1) Consistency with State Health Plan. The proposed service must, to the extent applicable, be consistent with the relevant provisions of the Alabama State Health Plan in effect when the application is received by SHPA. The SHPA Staff Report, along with the undisputed evidence of record, shows that the Baptist application was clearly consistent. Section 410-1-6-.02 of the SHPA *Rules and Regulations (Rev. 1991).*

(2) Long-range Development Plan of Applicant. SHPA requires that the proposal under consideration bear a reasonable relationship to the long-term development plans of the applicant. This criterion has been obviously met by Baptist, especially as the same relates to the mission of Baptist, and its related entities, to provide quality health care to the indigent persons who reside in the Etowah County health service area. Section 410-1-6-.03 of the SHPA *Rules and Regulations (Rev. 1991).*

(3)Availability of Alternatives. SHPA is required to consider whether there are less costly, more efficient, or more appropriate alternatives to the proposed facility or service to be offered or expanded. SHPA is authorized to give priority consideration to "those alternatives that are [already] in existence" at the time of the application's filing. It is clear from the record that Baptist, with its already-existing network of physicians and referral systems, is an existing "alternative" to the establishment of a free-standing home health agency. The existing private duty nursing department at Baptist is quite similar to a home health agency operation and it will require virtually no changes in the structure of that department to begin providing home health in Etowah County. Section 410-1-6-.04 of the SHPA *Rules and Regulations (Rev. 1991).*

(4) Need for the Project. The CON Review Board must determine if there is a substantially unmet public need for the proposal under review. In this case, neither Baptist nor Alacare disputed the fact that there is an unmet need for additional home health services in Etowah County; there has simply been a dispute as to which entity was best able to provide the service. Additionally, the State Health Plan itself shows a need for home health care in Etowah County and that the health service area is

"underserved" as that term is defined by SHPA. Section 410-1-6-.05 of the SHPA *Rules and Regulations (Rev. 1991).*

In particular, SHPA regulations require that the CON Review Board give consideration to the following areas of inquiry, each of which Baptist more than meets for purposes of CON approval:

(a) Financial feasibility of the proposed change in service of the facility;

(b) Specific data supporting the demonstration of need for the proposed change in facility or service shall be reasonable, relevant and appropriate;

(c) Evidence of evaluation and consistency of the proposed change in facility or service with the facility's and the community's overall health needs and health-related plans;

(d) Evidence of consistency of the proposal with the need to meet nonpatient care objectives of the facility such as teaching and research;

(e) Evidence of review of the proposed facility, service or capital expenditure when appropriate and requested by other state agencies;

(f) Evidence of the locational appropriateness of the proposed facility or service such as transportation accessibility, manpower availability, local zoning, environmental health, etc.;

(g) Reasonable potential of the facility to meet licensure standards and

(h) Reasonable consideration shall be given to medical facilities involved in medical education.

(5) Current and Projected Utilization in the Area. SHPA considers the current and projected utilization of similar facilities or services within the service area in determining the need for additional facilities or services. In this particular case, the evidence is clear that there is a need for more home health service in the Etowah County area and that existing providers are simply not meeting the needs of the residents of the service area. The approval of the Baptist application will go toward eliminating that unmet need. Section 410-1-6-.06 of the SHPA *Rules and Regulations (Rev. 1991).*

(6) Access to the Facility or Service. The regulations require that the Board consider the contribution of the proposed service or facility toward meeting the health related needs of traditionally "medically underserved" groups (for example, low income persons, racial and ethnic minorities, women and handicapped persons). The purpose of such review is to ensure that the medically underserved will receive equal access to care, that the project will be accessible to the whole community and that the community needs the proposed facility or service. In making such determination, the Board considers a number of criteria, all of which were resolved favorably to Baptist by the members, *viz:*

(a) The extent to which the medically underserved currently use the applicant's services in comparison to the percentage of the population in the applicant's service areas which is medically underserved, and are expected to use the proposed services;

(b) The applicant's performance in meeting its obligation, if any, under any applicable federal regulations requiring provision of uncompensated care, community service or

access by minorities or handicapped to programs receiving federal financial assistance;

(c) The extent to which the unmet needs of Medicare, Medicaid and medically indigent patients are proposed to be served by the applicant and

(d) The extent to which the application offers a range of means by which a person will have access to the proposed services.

Section 410-1-6-.07 of the SHPA *Rules and Regulations (Rev. 1991).*

(7) Relationship to Existing Health Care System. The relationship of the proposed new service to the health care system of the service area must be considered by the CON Review Board. The proposed service should be complementary to the existing health care delivery system. Clearly, the home health proposal of Baptist meets this criterion for approval. Section 410-1-6-.08 of the SHPA *Rules and Regulations (Rev. 1991).*

(8) Past Performance of the Applicant. The Board also considers, by its own procedures, the quality of care provided by the applicant in the past. This standard is amply met by Baptist, which has a history of providing only the finest health services in the area. Section 410-1-6-.17 of the SHPA *Rules and Regulations (Rev. 1991).*

(9) Compliance with Licensure Rules and Regulations. The applicant must demonstrate an ability to meet all applicable requirements of the Division of Licensure and Certification of the Alabama Department of Public Health. Baptist, of course, meets this mandate because it is subjected to annual inspections and licensure reviews by the Department

of Public Health. Section 410-1-6-.16 of the SHPA *Rules and Regulations (Rev. 1991).*

(10 Appropriate Applicant. When deciding between competing applicants for CON authority, the Board must determine which applicant is the most appropriate for approval. Such determination is to be made from a review of the evidence as to ability of the person, directly or indirectly, to render adequate service to the public, including affirmative evidence as to the following:

(a) Professional capability of the facility proposing the capital expenditure (if any);

(b) Management capability of the facility providing the capital expenditure;

(c) Adequate manpower, including health personnel and management personnel, enabling the facility to offer the proposed health service;

(d) Evidence of the existence of the applicant's long-range planning program and an ongoing planning process;

(e) Evidence of existing and on-going monitoring of utilization and the fulfilling of unmet or undermet health needs in the case of expansion and

(f) Evidence of communication with all planning, regulatory, utility agencies and organizations that influence the facility's destiny.

Section 410-1-6-.09 of the SHPA *Rules and Regulations (Rev. 1991).*

The evidence certainly supports the determination of the CON Review Board that—as between Bap-

tist and Alacare—Baptist was the more appropriate applicant for home health CON authority.

While Section 41-22-20(k) of the *Code of Alabama 1975* provides that a final decision by SHPA (as, here, the decision by the Fair Hearing Officer) is to be taken as "prima facie" just and reasonable, it is also clear that the reviewing court can "reverse or modify the decision . . . if [it is] clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Section 41-22-20(k)(6) of the *Code of Alabama 1975*. See also: *Ex parte Shelby Medical Center, Inc.*, 564 So.2d 63 (Ala. 1990).

On review by the Fair Hearing Officer, the original decision of the nine-member CON Review Board was reversed on the "finding" that the decision in favor of Baptist had been "arbitrary or capricious." Yet such a finding is not only not supported in the record, but it is not supported by existing case law. In *Sexton v. Tuscaloosa County Civil Service Board*, 426 So.2d 432 (Ala. Civ.App. 1983), the Court of Civil Appeals of Alabama stated: "A decision is not arbitrary where there is a *reasonable justification* for the decision or where the determination is founded upon adequate principles or *fixed standards.*" *Sexton*, 426 So.2d at 435 (emphasis in original).

In this case, there have always been "fixed standards" upon which the decision was grounded. These fixed standards are found in Section 22-21-264 of the *Code of Alabama 1975* and the agency regulations. The statute, and accompanying regulations, provide the findings prerequisite to the issuance of a certificate of need for home health services. There is evidence in the record indicating a clear and unmet *need* for additional home health services in the Etowah County health service area. There is ample evidence showing that Baptist is prepared, and has the necessary capabilities, to meet that need. There-

fore, there was reasonable justification for SHPA's approval of Baptist and its dnial of Alacare. The decision, therefore, was not arbitrary or capricious as a matter of law.

D. *No Approval for both Applicants*

Alacare argued in its Request for Reconsideration and even before the Fair Hearing Officer that both the Alacare and the Baptist applications could be approved by the CON Review Board. Alacare argued that the need in Etowah County supported two additional agencies, and in its Request for Reconsideration stated: "* * * Alacare respectfully urges this Board to grant our Request for Reconsideration and to approve both application[s] based upon the record as a whole and because of the ongoing underservice in Etowah County."

The record shows, of course, that the Board denied the Request for Reconsideration. In fact, the CON Review Board has never approved the applications of two applicants for the same *urban* county at the same hearing. This is because, under SHPA's "Planning Policy 5," the Board is prohibited from approving an additional provider for home health services in any county in which another CON has been granted during the immediately preceding twelve (12) month period. That policy states: "Once a provider entity is approved for a county, that entity will be included as an active provider in that county for at least 12 months or through one complete cycle of SHPA's annual reporting period, whichever is greater. *No additional providers shall be approved during this time period except when an existing provider ceases services in that county.*" (Emphasis added). Alacare itself, in written statements filed with the SHPA, has acknowledged that Planning Policy 5 would apply to circumstances such as those found in this case. (Baptist Record at p. 173). In other cases cited by Baptist in the record below, SHPA's CON Review Board has made

it very clear that Planning Policy 5 prohibits the approval of two CON applications for the same county in the same hearing unless one of the applications is approved under some "other [index] of need" (such as SHPA Planning Policy 7, relating to priority consideration being given to rural hospitals).

Since Etowah County is not classified by SHPA as a "rural" county, the precedence of Planning Policy 7 never comes into play in this matter. Therefore, Planning Policy 5 dictates that only one of the two applicants could be approved by the SHPA Board. Once again, the decision of the Board was reasonably justified by the facts and by an appropriate application of the law to the relevant facts. Such a determination cannot, as a matter of law, be "arbitrary or capricious." Therefore, the Fair Hearing Officer's determination is due to be reversed and held for naught.

V. CONCLUSION

The result Baptist received at the hands of the hearing examiner was unsupported by the facts and by a proper application of the law to those facts. There is no substantial legal basis for the hearing officer's conclusion that the CON Review Board's action was "arbitrary" or "capricious," especially in light of the testimony and evidence supporting approval of the Baptist application.

Even in cases where the evidence has been meager or the testimony "generalized," the courts of Alabama have held that it is not the province of the reviewing entity to substitute its judgment or pass upon the wisdom of the decision of the administrative agency charged by the legislature with the responsibility of making such decisions. See, e.g., *Hughes v. Jefferson County Board of Education*, 370 So.2d 1034 (Ala.Civ.App. 1979); *State Health Planning Agency v. Rivendell of Alabama, Inc.*, 469 So.2d 613 (Ala.Civ.App. 1985).

In his specially concurring opinion in the *Rivendell* case, Judge Holmes noted that even though the SHPA's

CON Review Board had not approved the Rivendell project for a new psychiatric hospital facility, "there was ample evidence that [the hospital] would be highly beneficial to the citizens of this State." Yet and still, Judge Holmes wrote: "Put another way, in my view, there was ample evidence that would have supported SHPA's issuance of a Certificate of Need [to Rivendell]. However, in view of the evidence, the denial of the Certificate of Need cannot be said to be arbitrary or capricious."

In this case, there was more than ample evidence to support the CON Review Board's original approval of the Baptist application. Therefore, the approval of Baptist, and the concurrent denial of Alacare, cannot be said to have been "arbitrary" or "capricious."

The decision of the Fair Hearing Officer, accordingly, is found by this Court to be erroneous as a matter of law. Because the decision rendered in those proceedings must, therefore, be nullified and held for naught, the Court must determine whether the original decision of the CON Review Board was correct and proper as a matter of law. It was.

Based upon a review of the evidence herein, and the respective arguments and authorities supplied to the Court by the counsel to the parties, this Court finds and concludes that the original approval of the Baptist CON application, SHPA Project No. AL-91048, is due to be affirmed and that Alacare is to take nothing under or from its CON application with the state agency.

In accordance with such conclusions, this Court finds that the plaintiff is entitled to receive declaratory and injunctive relief under its Petition. Therefore, a Judgment and Injunction will be issued in conformity with this Memorandum Opinion. The injunction which this Court grants plaintiff directs the state defendants to issue, within sixty (60) days, Certificate of Need authority or approval to Baptist Hospital of Gadsden, Inc., as more fully explained hereinabove.

DONE: This the 10th day of June, 1993.

/s/ William H. Rhea, III
WILLIAM H. RHEA, III
Circuit Judge

Justice D. Smyth, III, Montgomery [For Baptist Hospital]
Margaret McNeill, Montgomery [For SHPA]
Nanette Sims, Birmingham [For Alacare]

APPENDIX C

ALABAMA
COURT OF CIVIL APPEALS

No. AV92-673

ALACARE HOME HEALTH SERVICES, INC.

v.

BAPTIST HOSPITAL OF GADSDEN, INC.

Appeal from Etowah Circuit Court

No. CV-92-695

Hon. William H. Rhea, III, Circuit Judge

Application for Rehearing filed May 27, 1994.

Application for Rehearing overruled June 17, 1994.

/s/ Thigpen
Judge

Richardson, P.J., and Yates, J., concur.

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

February 3, 1995

1931343

Ex parte Alacare Home Health Services, Inc. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Alacare Home Health Services, Inc. v. Baptist Hospital of Gadsden, Inc.) (AV92000673) (Etowah: CV-92-695)

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

COOK, J.—Maddox, Almon, Shores, Houston and Ingram, JJ., concur.

APPENDIX E

STATE OF ALABAMA
STATE HEALTH PLANNING AND
DEVELOPMENT AGENCY
MONTGOMERY, ALABAMA

FAIR HEARING IN THE MATTER OF:

Project No. AL-91090

ALACARE HOME HEALTH SERVICES, INC.
(ETOWAH COUNTY)

Project No. AL-91048

BAPTIST MEMORIAL HOSPITAL
(ETOWAH COUNTY)

FINAL ORDER

This cause came before the Hearing Officer upon the request of Alacare Home Health Services, Inc. ("Alacare") for a Fair Hearing concerning the denial of its CON Application in Project No. AL-91090 and the approval of the application in Project No. AL-91048 of Baptist Memorial Hospital ("BMH") by the CON Review Board pursuant to vote of December 3, 1991. Following issuance of a hearing notice, the parties stipulated on March 3, 1992 that the case would be decided by the Hearing Officer based on the record and written pleadings. On March 20, 1992, both BMH and Alacare filed briefs in support of their positions. BMH and Alacare filed responsive briefs on March 27, 1992.[1] ABC

[1] BMH objected to consideration of a "Proposed Order" filed by Alacare on March 31, 1992. Due to the fact that the Proposed

Home Health of Alabama, Inc. ("ABC"), filed a responsive brief on March 27, 1992 which was considered by the Hearing Officer on an amicus curiae basis.

Following the consideration of such material and after review of the whole record, the Hearing Officer has determined that the following Findings of Fact and Conclusions of Law are supported by a preponderant weight of evidence and law and thereby substantiate the Order that follows.

I.

FINDINGS OF FACT

1. On March 22, 1991, BMH filed an application with the State Health Planning and Development Agency ("SHPDA") to establish a new home health agency ("agency") in Etowah County, Alabama. Said application was accepted, designated as AL-91048, and assigned to the Board for public hearing pursuant to SHPDA Rules.

2. On March 29, 1991, Alacare filed an application with SHPDA to expand an existing agency into Etowah County, Alabama. Said application was accepted, designated as AL-91094, and assigned to the Board for public hearing pursaunt to SHPDA Rules.

3. On March 29, 1991, ABC Home Health Services of Alabama, Inc. ("ABC") filed an application with SHPDA to establish a new agency in Etowah County, Alabama. Said application was accepted, designated as AL-91042 and assigned to the Board for public hearing pursuant to SHPDA Rules.

4. Pursuant to SHPDA Rules, the three projects were batched for comparative review.

Order merely restates arguments raised in prior filings, it has been included in the record. The Hearing Officer has not given consideration to any factual statements contained in said document to which BMH has not had an opportunity to respond.

5. Following the batching of the aforementioned applications, ABC requested that the cases be treated as "*contested cases*" pursuant to the Alabama Administrative Procedure Act, *Ala. Code* §§ 41-22-1, *et seq.* (1975) as amended (the "AAPA"). Accordingly, the Executive Director of SHPDA assigned said projects to a hearing officer for a contested case hearing. On or about November 18, 1991, ABC withdrew its request for contested case status, as well as its request for intervenor status in regard to Alacare's project. On or about November 26, 1991, ABC withdrew its application.

6. The applications of BMH and Alacare were heard by the CON Review Board on a comparative basis at a public hearing held on December 3, 1991. At this meeting, the Board voted to approve BMH's application in Project AL-91048 and to deny Alacare's application in Project AL-91090.

7. On or about December 23, 1991, Alacare filed a motion for reconsideration with respect to both the BMH and Alacare projects. At a public hearing held on January 14, 1992, the Board failed to establish a voting quorum and, therefore, Alacare's motion was deemed to have been denied. On January 17, 1992, Alacare requested a Fair Hearing with respect to both the BMH and Alacare projects.

8. Alacare contends that the decisions of the Board in regard to both projects were arbitrary and capricious, due to the fact that they were not reasonably justified or based upon fixed standards. In support of its contention, Alacare raises several specific issues including: (1) whether the financial data, proposed charges and operating projections of BMH were suspect, misleading, and without evidentiary foundation; (2) whether the Board failed to provide Alacare with a fair and impartial hearing due to its consideration of Alacare's participation in an unrelated lawsuit against the Board; (3) whether the Board failed to give Alacare priority consideration as an

existing provider; and (4) whether the Board's action in approving BMH's application over that of Alacare's was consistent with its prior decisions in light of the proposed charges and cost of the projects.

9. According to the State Health Plan ("SHP") in effect at the time the applications were filed, Etowah has two active providers. Under § 410-2-4-.04(8)(d)(4) of the SHP ("Planning Policy 4"), any county below 3,000 visits and 80 persons served per 1,000 population age 65 and older may be considered for an additional agency. According to the SHP, Etowah County experienced 2,664 visits and 74 persons served per 1,000 population, thereby qualifying for one additional agency under the regulation. Thus, the granting of an additional agency is consistent with the SHP.

10. In regard to Alacare's contention that the Board failed to give it priority consideration as an existing provider, SHPDA Rule 410-1-6-.06(1)(e)1 states:

> *Expansion of existing services may be viewed more favorably than the establishment of new services as a generally more cost effective alternative, however, the availability and accessibility of services must be considered.*

Thus, § 410-1-6-.06(1)(e)1 provides two considerations for the Board: (1) that expansion of existing services may be viewed more favorably; and (2) that availability and accessibility of services must also be considered.

11. BMH claims that the granting of its application would be *"tantamount"* to an expansion of existing services due to the fact that it previously provided home health services through a contract with the Etowah County Health Department and currently provides private duty nursing services. It claims that these operations, along with its general hospital activities, provide it with the experience and resources to provide home health services.

12. At the December 3, 1991 hearing, BMH also pointed to its commitment to provide health care to indigent patients and improve the accessibility of such services. BMH also cited the advantages of a close working relationship between those involved with the hospital and those providing the home health services. (Transcript of CON Board hearing, p. 5).

13. Due to the fact that these projects were not considered on a contested case basis, there is little in the record to substantiate the claims of either party as to the appropriateness of their applications. It is undisputed that Alacare is an *existing provider* for purposes of § 410-1-.06(1)(e)1. While BMH has experience in the type of services described in its application, it is not a certificated provider seeking to expand an existing service. There was some evidence, however, that BMH's project will improve accessibility of such services by ensuring the availability of less costly alternatives to in-patient care. Unfortunately, the transcript of the hearing and the written Order provide little indication of the weight given by the Board to these factors. The Hearing Officer finds that, given the context of the "*informal*" hearing process, the evidence was sufficient for the Board to reach a conclusion that the grant of BMH's application would improve the accessibility of services in the area. This is just one factor to be weighed by the Board, however, and in light of the remaining evidence is not sufficient to justify the selection of BMH as the most appropriate applicant.

14. SHPDA Rule 410-1-6-.04 and *Ala. Code* § 22-21-244 (1975) provide that the cost of providing health care services is an important factor to be considered by the Board. The Orders of the CON Board approving BMH's application, and denying that of Alacare's, specifically cite the projected charges of these projects as a basis for the Board's decision.

15. In its application, as reflected in the December 3, 1991 Order, Alacare proposed the following charges:

Skilled Nursing	$85.00
Physical Therapy	85.00
Speech Therapy	85.00
Occupational Therapy	85.00
Social Services	95.00
Home Health Aide	40.00

Alacare estimates that the capital costs associated with the project would to be limited to $9,000.00, consisting of office computer equipment. (Alacare, R. 106).

16. In its application, as reflected in the December 3, 1991 Order, BMH proposes the following charges:

Skilled Nursing	$91.65
Physical Therpay	82.74
Speech Therapy	94.77
Occupational Therapy	90.19
Social Services	124.63
Home Health Aide	52.98

17. As shown above, Alacare's proposed charges are clearly lower than those of BMH's, which distinguishes this case from three other comparative hearings involving Alacare which were heard immediately prior to the Etowah County vote. In each of the other cases, the Board issued Orders approving the application of a local hospital over that of Alacare's which contained an analysis of the proposed charges of the respective applications. In its orders, the Board implicitly found that the hospitals, on the basis of charge data, were the lowest cost providers. In the present case, the situation is reversed, with BMH providing proposed charges higher than the established and documented charges of Alacare. Although the written orders issued by the Board in regard to both projects cite the proposed charges of the respective applicants, they provide no explanation as to why the Board elected to choose the provider with the highest proposed

charges. In light of the record of the public hearing, and the language of the written orders in each of the other home health cases decided contemporaneously by the Board, there is no reasonable basis for this contradiction. Accordingly, the Fair Hearing Officer finds that the decisions of the Board in regard to both projects were arbitrary and capricious.

18. Alacare states that its proposed operation will have less of an effect on "*existing facilities or services*" than that of BMH, and that the Board violated its rights to a fair hearing by considering Alacare's participation in certain litigation involving the Board. Such allegations need not be addressed in light of the findings above. Nevertheless, the Fair Hearing officer hereby adopts the findings on these issues as set out in the Orders issued in regard to Cherokee County (Project Nos. AL-91080 and AL-91026), Limestone County, (Project Nos. AL-91094 and AL-91095), and DeKalb County (Project Nos. AL-91085 and AL-9027).

19. The Hearing Officer recognizes that the record before the Board is meager and that the parties were not given the opportunity to explore the underlying strengths and weaknesses of the opposing applications through any type formal hearing process. Such a process is not required, however, under Alabama law or SHPDA Rules, absent a timely request from a party of record. Nevertheless, a minimum of consistency in the consideration of home health applications is required under the law.

The conclusions of the Board in regard to the applications of BMH and Alacare were not justified by the record and testimony before the Board. Given the standard applied by the Board in prior cases and the failure of the Board to provide a basis for its deviation from such standards, the decisions of the Board in Projects AL-9028 and AL-91084 are due to be set aside.

II.

CONCLUSIONS OF LAW

1. This proceeding was lawfully conducted pursuant to *Ala. Code* § 22-21-275(14) (1975), as amended, and SHPDA Rules 410-1-8-.14-.18.

2. All parties were properly notified and have submitted briefs on the issues involved.

3. The Hearing Officer finds that the decisions of the Board to approve Project No. AL-91048 and to deny Project No. AL-91090 were inconsistent with fixed standards as applied by the Board in prior cases and was not justified by the evidence and testimony before the Board.

ORDER

Therefore, in accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED that the Order of the CON Board approving Project No. AL-91048 and the Order denying Project No. AL-91090 are hereby reversed. The application filed in Project No. AL-91048 is hereby denied and the application filed in Project No. AL-91090 is hereby granted.

DONE this 28th day of May, 1992.

/s/ Mark D. Wilkerson
MARK D. WILKERSON, ESQ.
Hearing Officer

cc: Mr. Derrell O. Fancher
Mr. James E. Sanders
Kym Reddoch, Esq.
Margaret McNeil, Esq.
Mr. John G. Beard
M. Ann Huckstep, Esq.
Eugene Watson, Esq.

APPENDIX F

RULING OF THE CERTIFICATE OF NEED REVIEW BOARD

AL-91026 Baptist Medical Center Cherokee Centre, Alabama

FACTS:

1. This is an application for certificate of need for the establishment of a home health agency to serve the residents of Cherokee County. There are no capital costs associated with this project. This application was batched and considered comparatively with AL-91080 Alacare Home Health Services, Inc. This application was not considered by the Board as originally scheduled on July 9, 1991 as ABC Home Health Agency, Inc. formally intervened and requested a contested case hearing by letter dated June 7, 1991. ABC Home Health of Alabama, Inc. withdrew the request for contested Case hearing, on November 26, 1991 and filed a notice of withdrawal of their application AL-91032.

2. There is no new construction associated with this project.

3. The proposed charges after the completion of this project will be $69.00 per visit for nursing, $78.00 for physical therapy, $78.00 for speech therapy, $70.00 for occupational therapy, $108.00 for social services and $45.00 for home health aide.

4. The proposed primary service area for this project is Cherokee County. The population projection for 1991 asre as follows

County	Estimated Population	Percentage 65 and Older	Population 65 and Older
Cherokee	21,799	14.8%	3,224

5. Page 95 of the State Health Plan indicates that Cherokee County has one active provider. The county is also indicated to be underserved. Page 97 of the Plan notes that there are three inactive providers serving Cherokee County. Planning policy number 2 on page 92 of the State Health Plan states that only agencies which hold a CON to serve the county and provide services to a minimum of 60 patients annually are considered "active". Planning policy number 3 on page 93 states that only statistical data generated by "active providers" will be used in needs assessment. Planning policy number 4 on page 93 of the State Health Plan provides that any county below 3,000 visits and 80 persons served per 1,000 population 65 and older may be considered for an additional agency. The chart on page 95 of the State Health Plan shows only 2,091 visits and 50.5 persons served per 1,000 population age 65 and older in Cherokee County. Planning policy number three on page 88 states that to insure availability accessibility and freedom of choice, two active providers per county shall be allowed without regard to needs methodology calculations. Individually or collectively, these two active providers should accept all third party payment sources, Medicaid and indigent patients.

6. The increase in Cherokee County's elderly population and the current prospective payment system producing pressure to cut length of stay has placed growing pressure on BMC Cherokee Hospital to discharge patients to less restrictive levels of care that are now inappropriate or unavailable.

7. On page 30 of the application, the applicant stated that this project will not adversely affect other home health care providers serving Cherokee County residents as evidenced by current factors within Cherokee County.

8. The applicant projects that 90 persons will receive 3081 visits in 1991 and 96 persons with 3287 visits in 1992.

9. The applicant projects that the source of revenue will be 92% for Medicare and 8% self pay in 1992.

Based on the above facts, and upon the provisions of Section 22-21-264, *Code of Alabama,* 1975 the Board finds the following:

a. that the application is consistent with the current State Health Plan;

b. that the project has demonstrated a community need; and,

c. that the applicant is the most appropriate applicant.

By vote of the Certificate of Need Review Board, for the reasons herein stated, Project AL-91026 is hereby approved.

/s/ F. Wallace Bromberg, Jr.
F. WALLACE BROMBERG, JR.
Acting Chairman
Certificate of Need Review Board

Done this 3rd day of December, 1991.

RULING OF THE CERTIFICATE OF NEED REVIEW BOARD

AL-91080 Alacare Home Health Services, Inc.
Birmingham, Alabama

FACTS:

1. This is an application for certificate of need for a home health agency to expand its existing service area to include Cherokee County. Capital costs associated with this project are $9,000. This application was batched and considered with AL-91026 Baptist Medical Center Cherokee. This application was not considered by the Board as originally scheduled on July 9, 1991 as ABC Home Health Agency, Inc. formally intervened and requested a contested case hearing by letter dated June 7, 1991. ABC Home Health of Alabama, Inc. withdrew the request for contested Case hearing, on November 26, 1991 and filed a notice of withdrawal of their application AL-91032.

2. The proposed charges after the completion of this project will be $85.00 per visit for nursing, $85.00 for physical therapy, $85.00 for speech therapy, $85.00 for occupational therapy, $95.00 for social services and $40.00 for home health aide. Medicare reimburses based on actual cost per visit. Medicaid reimburses $27.00 fo skilled nursing and aide visits. Blue Cross of Alabama pays for skilled nursing at $50.00 per visits.

3. Capital costs associated with this project are $9,000 for equipment.

Based on the above facts, and upon the provisions of Section 22-21-264, *Code of Alabama*, 1975 the Board finds the following:

a. that the applicant is not the most appropriate applicant.

By vote of the Certificate of Need Review Board, for the reasons herein stated, Project AL-91080 is hereby disapproved.

/s/ F. Wallace Bromberg, Jr.
F. WALLACE BROMBERG, JR.
Acting Chairman
Certificate of Need Review Board

Done this 3rd day of December, 1991.

RULING OF THE CERTIFICATE OF NEED REVIEW BOARD

AL-91095 Athens-Limestone Hospital
Athens, Alabama

FACTS:

1. This is a Certificate of Need application for the development and operation of a home health agency to provide services to the residents of Limestone County. There are no capital costs associated with the project. This application was batched and heard comparatively with AL-91094, Alacare Home Health Services, Inc. This application was not considered by the Board as originally scheduled on July 9, 1991 as AL-91043 ABC Home Health of Alabama, Inc. formally intervened and requested a contested case hearing. Subsequently, ABC Home Health of Alabama, Inc. withdrew their request for a contested case hearing and also withdrew application number AL-91043.

2. There is no new construction associated with this project.

3. The proposed primary service area for this project is Limestone County. The population projections for 1991 are as follows: Total population of Limestone county is 52,884 and 65 and older population is 6,849.

4. The proposed charge will be $69.00 per visit for nursing, $78.00 for physical therapy, $70.00 for speech therapy, $108.00 for social services and $45.00 for home health aide.

5. The applicant projected that the source of revenue will be 91% for Medicare, and 9% self-pay in 1992.

6. This project will have no adverse affect on the operations of active providers in Limestone County. The home health care market in Limestone County is

considerably underserved and can accommodate one additional provider.

7. The applicant projects that 200 patients will receive 6848 visits in 1991 and 215 patients will receive 7361 visits in 1992.

8. Planning Policy number 4 on page 93 of the State Health Plan states that any county below 3,000 visits and 80 persons served per 1000 population 65 and older may be considered for an additional agency. The chart on page 95 of the Plan indicates that only 800 visits and 49.5 persons were served per 1000 population age 65 and older in Limestone County.

   Page 95 of the State Health Plan indicates that there are two active providers serving Limestone County. The county is also depicted as underserved. There are also two inactive providers serving Limestone County. Planning Policy number 2 on page 92 states that only agencies which hold a CON to serve the county and provide services to a minimum of 60 patients annually are considered "active". Planning Policy number 3 on page 93 provides that only statistical data generated by "active" providers" will be used in needs assessment.

Based on the previously stated facts, and upon the provisions of Section 22-21-264, *Code of Alabama*, 1975 the Board finds the following:

a. that the application is consistent with the current State Health Plan;

b. that the project has demonstrated a community need; and,

c. that the applicant is not the most appropriate applicant.

By vote of the Certificate of Need Review Board, for the reasons herein stated, Project AL-91095 is hereby approved.

/s/ F. Wallace Bromberg, Jr.
F. WALLACE BROMBERG, JR.
Acting Chairman
Certificate of Need Review Board

Done this 3rd day of December, 1991.

RULING OF THE CERTIFICATE OF NEED REVIEW BOARD

AL-91090 Alacare Home Health Services, Inc.
Birmingham, Alabama

FACTS:

1. This is an application for a Certificate of Need for the expansion of a service area of an existing home health agency to serve the residents of Etowah County. Capital costs associated with this project was $9,000 for equipment. This application was heard comparatively with AL-91048, Baptist Health of Gadsden, Inc. This application was not considered by the Board as originally scheduled on July 9, 1991 as AL-91042. ABC Home Health Agency, Inc. formally intervened and requested a contested case hearing. Subsequently, ABC Home Health of Alabama, Inc. withdrew their request for contested Case hearing and also withdrew application Number AL-91042.
2. The equipment will be funded from cash on hand.
3. The proposed charges after the completion of this project will be $85.00 per visit for nursing, $85.00 for physical therapy, $85.00 for speech therapy, $85.00 for occupational therapy, $95.00 for social services and $40.00 for home health aide. Medicare reimburses based on actual cost per visit. Medicaid reimburses $27.00 for skilled nursing and aide visits. Blue Cross of Alabama pays for skilled nursing at $50.00 per visit.
4. Alacare Home Health Services, Inc. is an Alabama corporation based in Jefferson County, Alabama. Alacare holds CONs to serve nine north central Alabama Counties and two northeast Alabama Counties.

Based on the previously stated facts and upon the provisions of Section 22-21-264, *Code of Alabama*, 1975 the Certificate of Need Review Board finds the following:

a. that the applicant is not the most appropriate applicant.

By vote of the Certificate of Need Review Board, for the reasons herein stated, Project AL-91090 is hereby disapproved.

/s/ F. Wallace Bromberg, Jr.
F. WALLACE BROMBERG, JR.
Acting Chairman
Certificate of Need Review Board

Done this 3rd day of December, 1991.

RULING OF THE CERTIFICATE OF NEED REVIEW BOARD

AL-9027 Baptist Medical Center DeKalb
Fort Payne, Alabama

FACTS:

1. This is an application for a certificate of need for the development and operation of a home health agency to serve the population of DeKalb County. There were no capital costs associated with this application. This application was batched and heard comparatively with AL-91084, Alacare Home Health Services, Inc. This application was not considered by the Board as originally scheduled on July 9, 1991, as AL-91034, ABC Home Health of Alabama, Inc. formally intervened and requested a contested case hearing. Subsequently, ABC Home Health of Alabama, Inc. withdrew their request for a contested case hearing and also withdrew application number AL-91034.

2. There is no construction cost associated with this project.

3. The proposed charges will be $69.00 per visit for nursing, $78.00 for physical therapy, $78.00 for speech therapy, $70.00 for occupational therapy, $108.00 for social services and $45.00 for home health aide.

4. The proposed primary service area for this project is DeKalb County. The population projection for 1991 is 60,823 and the population 65 and older is 8,699 or 14.3% of the total population.

5. DeKalb County is designated as rural and the physician shortage is acute; persons must travel longer distances to obtain health care; emergency health services are more deficient than in urban areas; and a comprehensive approach to health care delivery often is not present. This application promotes continuity of health care services in DeKalb County, the

economic viability of BMC DeKalb Hospital and will insure the availability of less costly alternatives to inpatient care.

6. This project should not adversely affect the other providers of home health care in DeKalb County as evidenced by the available market projected by other need method calculations.

7. The applicant projects that 393 patients will receive 13,456 visits in 1991 and 421 patients will receive 14,415 visits in 1992.

8. Page 95 of the State Health Plan indicates that DeKalb County is designated as rural by Health Care Financing Administration. DeKalb County is also underserved. There is only one active provider of home health services and one inactive provider in the County.

   Planning Policy number 2 on page 92 states that only agencies which hold a CON to serve the county and provide services to a minimum of 60 patients annually are considered "active". Planning Policy number 3 on page 93 states that only statistical data generated by "active providers" will be used in needs assessment.

   The SHOC recognizes the need for rural hospitals to emphasize the provision of non-acute care. Therefore, rural hospitals may receive priority consideration in the review process. Under this policy, only one additional applicant in each rural county may be approved. Only a general acute care hospital which operates its primary facility in a rural county may receive such priority consideration.

   Planning Policy number 4 on page 93 states that any county below 3,000 visits and 80 persons served per 1,000 population 65 and older may be considered for an additional agency. In DeKalb County only

1,201 visits and 35.8 persons were served per 1,000 population 65 and older.

Additionally, Planning Policy number 3 on page 88 provides that to insure availability, accessibility and freedom of choice, two active providers per county shall be allowed without regard to needs methodology calculations.

Based on the previously stated facts, and upon the provisions of Section 22-21-264, *Code of Alabama*, 1975, the Board finds the following:

a. that the application is consistent with the current State Health Plan;

b. that the project has demonstrated a community need; and

c. that the applicant is the most appropriate applicant.

By vote of the Certificate of Need Review Board for the reasons herein stated, Project Number AL-9027 is hereby approved.

/s/ F. Wallace Bromberg, Jr.
F. WALLACE BROMBERG, JR.
Acting Chairman
Certificate of Need Review Board

Done this 3rd day of December, 1991.

RULING OF THE CERTIFICATE OF NEED REVIEW BOARD

AL-91084 Alacare Home Health Services, Inc.
Birmingham, Alabama

FACTS:

1. This is a Certificate of Need application for the expansion of the applicant's services to include DeKalb County. Capital costs associated with this project was $9,000 for equipment. This application was batched with and heard comparatively with AL-9027, Baptist Medical Center DeKalb. This application was not considered by the Board as originally scheduled on July 9, 1991, as AL-91034, ABC Home Health of Alabama, Inc. formally intervened and requested a contested case hearing. Subsequently, ABC Home Health of Alabama, Inc. withdrew their request for a contested case hearing and also withdrew application number AL-91034.

2. The proposed charges after the completion of this project will be $85.00 per visit for nursing, $85.00 for physical therapy, $85.00 for speech therapy, $85.00 for occupational therapy, $95.00 for social services and $45.00 for home health aide. Medicare reimburses based on actual cost per visit. Medicaid reimburses $27.00 for skilled nursing and aide visits. Blue Cross of Alabama pays for skilled nursing at $50.00 per visit.

3. Alacare Home Health Services, Inc. is an Alabama corporation based in Jefferson County, Alabama. Alacare holds CONs to serve nine north central Alabama Counties and two northeast Alabama Counties.

Based on the above facts, and upon the provisions of Section 21-22-264, *Code of Alabama*, 1975, the Board finds the following:

a. that the applicant is not the most appropriate applicant.

By vote of the Certificate of Need Review Board, for the reasons herein stated, Project Number AL-91084 is hereby disapproved.

/s/ F. Wallace Bromberg, Jr.
F. WALLACE BROMBERG, JR.
Acting Chairman
Certificate of Need Review Board

Done this 3rd day of December, 1991.

APPENDIX G

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1.

Citizenship Rights Not to Be Abridged by States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

CODE OF ALABAMA

ARTICLE 9.

CONTROL AND REGULATION OF DEVELOPMENT OF CERTAIN HEALTH CARE FACILITIES.

§ 22-21-260. Definitions.

As used in this article, the following words and terms, and the plurals thereof, shall have the meanings ascribed to them in this section, unless otherwise required by their respective context:

* * * *

(4) STATE HEALTH PLAN. A comprehensive plan which is prepared triennially and reviewed at least annually and revised as necessary by the statewide health coordinating council, with the assistance of the state health planning and development agency, and approved by the governor.

The state health plan shall provide for the development of health programs and resources to assure that quality health services will be available and accessible in a manner which assures continuity of care, at reasonable costs, for all residents of the state.

* * * *

(5) HEALTH CARE FACILITY. Such term shall include; General and specialized hospitals, including tuberculosis, psychiatric, long-term care and other types of hospitals, and related facilities such as, laboratories, out-patient

* * * *

§ 22-21-264. Criteria for state agency review.

The SHPDA, pursuant to the provisions of section 22-21-274, shall prescribe by rules and regulations the cri-

teria and clarifying definitions for reviews covered by this article. These criteria shall include at least the following:

(1) Consistency with the appropriate state health facility and services plans effective at the time the application was received by the state agency, which shall include the latest approved revisions of the following plans:

a. The most recent Alabama state health plan which shall include updated inventories and separate bed need methodologies for inpatient rehabilitation beds, impatient psychiatric beds and inpatient/residential alcohol and drug abuse beds.

b. Alabama state plan for services to the mentally ill.

c. Alabama state plan for rehabilitation facilities.

d. Alabama development disabilities plan.

e. Alabama state alcoholism plan.

f. Such other state plans as may from time to time be required by state or federal statute.

(2) The relationship of services reviewed to the long-range development plan (if any) of the person providing or proposing such services.

(3) The availability of alternative, less costly or more effective methods of providing such services.

(4) Determination of a substantially unmet public requirement for the proposed health care facility, service or capital expenditure that is consistent with orderly planning within the state and the community for furnishing comprehensive health care, such determination to be established on the merits of the proposal after giving appropriate consideration to:

a. Financial feasibility of the proposed change in service of facility;

b. Specific data supporting the demonstration of need for the proposed change in facility or service shall be reasonable, relevant and appropriate;

c. Evidence of evaluation and consistency of the proposed change in facility or service with the facility's and the community's overall health and health-related plans;

d. Evidence of consistency of the proposal with the need to meet nonpatient care objectives of the facility such as teaching and research;

e. Evidence of review of the proposed facility, service or capital expenditure when appropriate and requested by other state agencies.

f. Evidence of the locational appropriateness of the proposed facility or service such as transportation accessibility, manpower availability, local zoning, environmental health, etc.;

g. Reasonable potential of the facility to meet licensure standards.

h. Reasonable consideration shall be given to medical facilities involved in medical education.

(5) Determination that the person applying is an appropriate applicant, or the most appropriate applicant in the event of duplicative applications, for providing the proposed health care facility or service, such determination to be established from the evidence as to the ability of the person, directly or indirectly, to render adequate service to the public, including affirmative evidence as to the following:

a. Professional capability of the facility proposing the capital expenditure;

b. Management capability of the facility proposing the capital expenditure;

c. Adequate manpower to enable the facility to offer the proposed service;

d. Evidence of the existence of the applicant's long-range planning program and an ongoing planning process;

e. Evidence of existing and ongoing monitoring of utilization and the fulfilling of unmet or under met health needs in the case of expansion;

f. Evidence of communication with all planning, regulatory, utility agencies and organizations that influence the facility's destiny.

(6) Consideration of the special needs and circumstances of those entities which provide a substantial portion of their services or resources, or both, to individuals not residing in the health service area in which the entities are located or in adjacent health service areas.

(7) The special needs and circumstances of health maintenance organizations.

(8) In case of a construction project, consideration shall be given to:

a. The costs and methods of the proposed construction including the costs and methods of energy provision; and

b. The probable impact of the construction project reviewed on the costs of providing health services. (Acts 1977, 1st Ex. Sess., No. 82, p. 1509, § 6; Acts 1982, 2nd Ex. Sess., No. 82-770, p. 249, § 4; Acts 1990, No. 90-468, § 1.)

§ 22-21-266. [Certificate of need]—Required findings for inpatient facilities.

No certificate of need for new inpatient facilities or services shall be issued unless the SHPDA makes each of the following findings:

(1) That the proposed facility or service is consistent with the latest approved revision of the appropriate state plan effective at the time the application was received by the state agency;

(2) That less costly, more efficient or more appropriate alternatives to such inpatient service are not available, and that the development of such alternatives has been studied and found not practicable;

(3) That existing inpatient facilities providing inpatient services similar to those proposed are being used in an appropriate and efficient manner consistent with community demands for services;

(4) That in the case of new construction, alternatives to new construction (e.g., modernization and sharing arrangement) have been considered and have been implemented to the maximum extent practicable; and

(5) That patients will experience serious problems in obtaining inpatient care of the type proposed in the absence of the proposed new service. (Acts 1977, 1st Ex. Sess., No. 82, p. 1509, § 7; Acts 1982, 2nd Ex. Sess., No. 82-770, p. 249, § 6.)

§ 22-21-275. Procedures for review of applications for certificates of need.

The SHPDA, pursuant to the provisions of section 22-21-274, shall prescribe by rules and regulations the procedures for review of applications for certificates of need and for issuance of certificates of need. Rules and regu-

lations governing review procedures shall include, but not necessarily be limited to, the following:

(1) Agreement with other review agencies for review procedures consistent with this article and federal regulations.

(2) Application procedures and forms of the application necessary to elicit and provide all necessary information as required by the review criteria.

(3) Establishment of a project review period of 90 days from the date the state agency determines that the application is complete and notification thereof is made to the applicant. The rules and regulations may provide for a period of not more than 15 days for determination of the completeness of the application, notification of the beginning and termination dates of the project review period and criteria for determining by the state agency of an extension of the project review period not to exceed 30 days with or without the consent of the applicant. An extension of the review period without limitation may be made with the written consent of the applicant. All reviews must be completed prior to the termination of the review period. If the state agency does not make a decision within the period of time specified for state agency review, the proposal shall be deemed to have been found not to be needed.

(4) Provision of a "nonsubstantive" review which shall be a modified review applicable to proposals for capital expenditures up to $500,000.00 and which:

a. Do not result in a substantial change in a service; or

b. Propose equipment to upgrade or expand an existing service; or

c. Increase the bed capacity by not more than 10 percent of the existing bed capacity; provided, that such increase in bed capacity is consistent with the state health plan.

(5) Public notification of receipt of application, review periods, public hearings, decisions of the state agency, fair hearings if requested and final decisions regarding a certificate of need.

(6) Public hearings on the application for the certificate of need. The SHPDA shall make provisions for a public hearing in the course of agency review if requested by one or more persons directly affected by the review.

(7) Schedule for reviews to include hearings before the review agencies, beginning and ending of review periods and time of the review period as provided in this section.

(8) Provision of the applicant to submit such information that he may deem advisable in justification of the application over and above the minimum information required by this article and the regulations adopted hereunder.

(9) Provisions for periodic reports by the health provider or applicant respecting the development of the proposal subject to review and for which a certificate of need is issued.

(10) Provisions for written findings, as appropriate, which the state used as the basis for its decision or any recommendation of the state agency. Such findings and recommendations shall be provided to the applicant and available to other interested persons upon request and upon payment of a reasonable fee to cover actual costs of reproduction and handling.

(11) Notification upon request of providers of health services and other persons subject to review

of findings, recommendations and decisions made under this article.

(12) Provision for a public hearing upon written request and for good cause by any person for the reconsideration of a decision by the SHPDA. Request for a public hearing shall be made in writing not more than 30 days subsequent to the date of the decision and shall have the effect of holding in abeyance the final decision subject to the outcome of the public hearing.

(13) Provision that no decision of the SHPDA under this article shall be deemed final until 31 days following the date of the decision.

(14) Provisions that any adverse decision may be appealed to an agency of the state (other than the SHPDA) designated by the governor. The appeal proceedings shall be conducted pursuant to the requirements of the state of Alabama, regulations adopted under this article and federal regulations. Request for a fair hearing by the applicant shall be made within 30 days of the decision by the state agency and shall have the effect of holding in abeyance the decision subject to the outcome of the fair hearing. The decision of the appeals agency shall be considered the final decision of the state agency; provided, that the applicant may appeal the decisions to the circuit court of the county in which the applicant resides or of the county in which the applicant is situated.

(15) Preparation and publication, at least annually, of reports by the state agency to the review being conducted, decision reached, certificates issued and status of proposals.

(16) Access by the general public to applications reviewed by the SHPDA and to other written material pertinent to the review.

(17) Provisions for letters of intent in the case of construction projects by persons proposing such projects. Letters of intent shall be in such detail as the SHPDA may direct by regulations. Letters of intent shall not substitute for the formal application for a certificate of need as provided in this article.

(18) Provision that the review procedure is being conducted and/or the nature and type of service or expenditure proposed. (Acts 1977, 1st Ex. Sess., No. 82, p. 1520, § 14: Acts 1979, No. 79-577, p. 1033, § 4; Acts 1982, 2nd Ex. Sess., No. 82-770, p. 249, § 13.)

APPENDIX I

STATE HEALTH PLANNING AGENCY ADMINISTRATIVE CODE

410-1-6-.04 Availability Of Alternatives.

(1) The availability of less costly, more efficient, more appropriate, or more effective alternatives to the proposed facility or service to be offered, expanded, or relocated will be considered.

(a) In the consideration of the availability of alternatives, priority may be given to those alternatives that are in existence.

(b) Less costly alternatives must be judged against the need for greater accessibility, availability, and the impact on the total health care system.

Statutory Authority: *Code of Ala. 1975*, §§ 22-21-264, 274.

410-1-6-.06 Additional Criteria For Determining Need.

(1) The following criteria shall be considered in determining whether a need for the project exists, which criteria shall be in addition to the criteria set forth in Section 410-1-6-.05:

(a) The need that the population served or to be served has for the services proposed to be offered, expanded, or relocated, will be considered. Specific data supporting the demonstration of need shall be reasonable, relevant, and appropriate. In cases involving the relocation of a facility or service, the extent to which a need will be met adequately by the proposed relocation or by alternative arrangements, and the effect of the relocation of the service on the ability of affected persons to obtain needed health care will be examined in determining whether there is a need for the proposed facility or service.

(b) *Population Statistics and Growth.* Unless clearly shown otherwise, current population estimates or projections published by the Center for Business and Economic Research, University of Alabama, and data from the SHPDA Division of Data Management will be considered to be the most reliable data available. Population factors are normally included within those methodologies contained in the State Health Plan for determining need.

(c) *Current and Projected Utilization in the Area.* The current and projected utilization of like facilities or services within the proposed service area will be considered in determining the need for additional facilities or services. Unless clearly shown otherwise, data, where available from the SHPDA Division of Data Management shall be considered to be the most reliable data available.

1. Current and projected utilization may be expressed in the State Health Plan as a guideline to the SHPDA Board. Where such is the case, the SHPDA Board should give due consideration to the guidelines.

(d) *Specialization of the Facility or Service.* The allocation of beds in the appropriate state plan addresses a general medical surgical bed need as well as a bed need for certain specialized services in the area. An applicant proposing to use such general medical surgical beds for a reviewable limited purpose service, such as obstetrical, must prove a need or an additional need in the service area.

(e) *Effect on Existing Facilities or Services.* The probable effect of the proposed facility or service on existing facilities or services providing similar services to those proposed shall be considered. When the service area of the proposed facility or service overlaps the service area of the proposed facility or service area of an existing facility or service, then the effect on the existing facility or service shall be considered. The applicant or interested party must clearly present the methodologies,

and assumptions upon which any proposed project's impact on utilization in affected facilities or services is calculated.

1. *Expanded Services or New Services.* Expansion of existing services may be reviewed more favorably than the establishment of new services as a generally more cost effective alternative, however, the availability and accessibility of services must be considered.

2. *Merger, Sharing, or Modernization of Services.* Any merger of services into one facility or entity from two or more facilities or entities which can be shown to result in lower health care costs without adversely affecting need of access will be considered a favorable factor. Sharing of services which result in lower health care cost shall be considered a favorable factor. Modernization of services as an alternative to new construction which result in lower health care costs shall be considered a favorable factor.

(f) *Community Reaction to the Facility or Service.* The community reaction to the facility should be considered. The applicant may, at its option, submit endorsements from community officials and individuals expressing their reaction to the proposal. If significant opposition to the proposal is expressed in writing or at a public hearing, the opposition may be considered an adverse factor and weighed against endorsements received. Absence of opposition may be considered a favorable factor.

Statutory Authority: *Code of Ala. 1975*, § 22-21-264.

410-1-6-.09 Appropriate Applicant.

(1) Determination shall be made that the person applying is an appropriate applicant, or the most appropriate applicant in the event of competing applications, for providing the proposed health care facility or service, such determination to be established from the evidence as to the ability of the person, directly or indirectly, to render adequate service to the public, including affirmative evidence as to the following:

(a) Professional capability of the facility proposing the capital expenditure.

1. If the applicant requires the services of a specialist, such as an open heart surgeon, the applicant will comment on the availability of such specialist.

(b) Management capability of the facility providing the capital expenditure.

(c) Adequate manpower, including health personnel and management personnel, enable the facility to offer the proposed service.

(d) Evidence of the existence of the applicant's long-range planning program and an ongoing planning process.

1. A copy of the long-range plan is not required to be provided to the state agency, however, a statement from the applicant regarding the plan will be required.

(e) Evidence of existing and on-going monitoring of utilization and the fulfilling of unmet or undermet health needs in the case of expansion.

(f) Evidence of communication with all planning, regulatory, utility agencies and organizations that influence the facility's destiny.

Statutory Authority: *Code of Ala. 1975*, § 22-21-264(5).

410-1-6-.17 Past Performance Of Existing Services and Facilities.

In the case of existing services or facilities, the quality of care provided by those services or facilities in the past will be considered.

Statutory Authority: *Code of Ala. 1975*, §§ 22-21-264, 274.

410-1-8-.22 Substance And Limitation Of Fair Hearing.

The primary purpose of the fair hearing is to determine whether the application meets the required findings

of *Code of Ala. 1975*, Section 22-21-266, if applicable, and whether it is consistent with the criteria and standards set out in these rules, and whether it is consistent with the appropriate state plan. The fair hearing officer may not consider the correctness, adequacy, or appropriateness of the criteria, standards, and plans against which the application was measured.

(a) The scope of review by the fair hearing officer shall be limited to the following issues:

1. whether the application meets the requirements of *Code of Ala. 1975*, Section 22-21-266, with respect to inpatient facilities or services, if applicable, as well as whether the application is consistent with each of the applicable criteria and standards set forth in Chapter 6 of these rules, and whether the application is consistent with the appropriate state plan;

2. whether the state agency acted in an arbitrary or capricious manner without a reasonable justification for the decision or absent fixed standards against which the application was measured, or whether the state agency otherwise abused its discretion in deciding among competing applications;

3. whether the state agency materially failed to follow review procedures as set out in these rules and whether the error was substantial in its effect.

(b) The following shall not be considered by the fair hearing officer and shall be deemed immaterial to the fair hearing:

1. the correctness, adequacy, or appropriateness of the criteria, standards or plans by which the application was measured; or

2. new evidence or argument, whether written or oral, which has not been considered by the Certificate of Need Review Board or Administrative Law Judge at any previous hearing; or

3. the determination of whether the proposal is a new institutional health service subject to review as defined by these rules.

Statutory Authority: *Code of Ala. 1975*, § 22-21-275(14).

410-1-8-.24 Entry Of Final Order By The Fair Hearing Officer.

Within forty-five (45) days after the close of the evidence, the fair hearing officer shall enter a final order respecting the issuance of a certificate of need, which final order shall contain findings of fact and conclusions of law regarding the application. The final order of the fair hearing officer shall be effective upon its filing with the state agency. The applicant or other party may appeal the decision to either the Circuit Court of Montgomery County or the circuit court of the county in which the applicant resides or of the county in which the applicant is situated.

Statutory Authority: *Code of Ala. 1975*, §§ 22-21-275(14), 44-22-206.

Supreme Court, U.S.
FILED
JUL 7 1995
CLERK

No. 94-1817

In The

Supreme Court of the United States

October Term, 1994

ALACARE HOME HEALTH SERVICES, INC.,

Petitioner,

vs.

GADSDEN REGIONAL MEDICAL CENTER, FORMERLY BAPTIST HOSPITAL OF GADSDEN, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there exists a viable federal question for review by the United States Supreme Court.

2. Whether the decision of the Alabama State Health Planning Agency's Certificate of Need Review Board, made the subject of the petition, implicated in any fashion the substantive due process rights of the Petitioner under the *Fourteenth Amendment to the United States Constitution.*

PARTIES INVOLVED

Petitioner/Appellant:

Alacare Home Health Services, Inc. (No known parent corporation or subsidiaries.)

Respondent/Appellee:

Quorum Health Group, Inc., Parent Corporation.

Gadsden Regional Medical Center, formerly Baptist Hospital of Gadsden, Inc.

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OPINIONS BELOW

By action taken on the 3rd day of February, 1995, the Supreme Court of Alabama denied the Petition for Writ of Certiorari to the Court of Civil Appeals filed by Alacare Home Health Services, Inc. ("Alacare"). *See* A-54a. The decision of the Alabama Court of Civil Appeals, from which this appeal is attempted, is styled *Alacare Home Health Services, Inc. v. Baptist Hospital of Gadsden, Inc.*, 1994 WL 182001, ___ So.2d ___ (Ala. Civ. App. 1994), *cert. denied*, ___ So.2d ___ (Ala. 1995). A-1a.

STATEMENT OF JURISDICTION

The decision, concerning which review is sought, is a judgment of the Court of Civil Appeals of Alabama dated May 13, 1994. The Court of Civil Appeals of Alabama denied rehearing on June 17, 1994. The Supreme Court of Alabama denied Petitioner Alacare's Writ of Certiorari to that court on February 3, 1995, which denial the Petitioner has used as providing a basis for its filing with this United States Supreme Court.

The jurisdictional ground assigned by the Petitioner is 28 U.S.C. § 1257(a). In particular, Petitioner asserts that the decision below should be reviewed by the Supreme Court because it constitutes a final judgment or decree from the Court of Civil Appeals where "any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." Petitioner further contends that jurisdiction is proper under Supreme Court Rule 10.1(c) if "a state court . . . has decided an important question of federal law in a way which conflicts with the applicable decisions of the Court."

Respondent Gadsden Regional Medical Center, Inc., formerly Baptist Hospital of Gadsden, Inc. ("Baptist" herein, for clarity) respectfully says that the assigned jurisdictional grounds

are merely hypothetical constructs under which legitimate claims could be advanced if there were a factual setting supporting such arguments. Under the instant facts, however, the so-called "substantive due process" argument was never properly preserved for appeal and, even if it had been, there are no facts or legal theories supporting such an argument.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Respondent will not attempt to add to, or delete from, the constitutional provisions, statutes and regulations cited by the Petitioner as being associated with this matter. While the Respondent takes the position that there is no basis for the granting of the petition in the first instance, the Respondent does agree that — to the extent any argument can be made by the Petitioner in support of its position — the provisions cited would be appropriate given the factual and procedural history of this matter.

Amendment XIV of the Constitution of the United States; Section 22-21-260 *et seq.* of the *Code of Alabama (1975)* and the regulations governing the award of Certificates of Need are contained in the Appendix. For ease of reference, and in conformity with the arrangement of such citations in the filing by the Petitioner, Respondent sets forth the following items and references for the Court, *viz:*

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STATEMENT OF THE CASE

A. The Nature of the Case

This appeal deals with a decision of the Alabama State Health Planning Agency ("SHPA"), the sole designated state health planning and development agency of the State of Alabama. *See* Section 22-21-260 *et seq.* of the *Code of Alabama (1975).* By Agency action on December 3, 1991, Baptist Hospital of Gadsden, Inc. (today, Gadsden Regional Medical Center, but referred to herein, for clarity, as "Baptist") was approved in its plan to establish and operate a home health agency in Etowah County, Alabama. That decision by the Certificate of Need Review Board ("CONRB") was then made subject of a SHPA "Fair Hearing" (*See* Section 22-21-275(14) of the *Code of Alabama (1975)* where the parties submitted the matter to an administrative law judge on the record and briefs of the parties.

Following the filing of briefs, the administrative law judge issued his "final order" on or about May 28, 1992, *completely reversing what the nine-member CONRB had decided.* The result reached by the hearing examiner was the denial of the Baptist CON application and the approval of the competing Alacare application. It was the decision of the "Fair Hearing Officer"

which was made the subject of a Notice of Appeal and a Petition for Judicial Review in the Circuit Court of Etowah County, Alabama.

The matter proceeded to review before the Circuit Court upon the administrative record, as supplemented, regarding the two Certificate of Need ("CON") applications filed with the SHPA by Baptist and Alacare Home Health Services, Inc. ("Alacare"). Both applicants were seeking approval from the health regulatory agency for authority to establish and operate home health services in the Etowah County service area. Because the applicants were subjected to a "comparative review" under applicable SHPA procedures, only one of the two applicants could be approved for the service. The approval of one of the applicants, of necessity, had to result in the denial of the other.

B. Course of Proceedings Below

The facts associated with the Petition for Judicial Review had their origin, as noted above, in the SHPA public hearings conducted in Montgomery on December 3, 1991, before the CONRB. In those hearings, the Board approved the Baptist plans to establish and operate a home health agency. The decision of the CONRB came following the reception of relevant testimony and evidence from Baptist, under SHPA Project No. AL-91048, and a similar presentation of testimony and evidence from Alacare, which was proceeding under the aegis of SHPA Project No. AL-91090.

At the conclusion of the hearing, Board member Hannah Brock moved to approve SHPA Project No. AL-91048 (Baptist) and to deny SHPA Project No. AL-91090 (Alacare). The motion was duly seconded by Board member Jim Purcell and then put to a vote. The Baptist project was approved after a quorum of the CONRB, by a majority vote of the members voting, indicated support for the Baptist project and rejection of the Alacare

project. Section 410-1-8-.05(1) of the SHPA *Rules and Regulations (Rev. 1991)*. A-63a.

The decision of the Board was later subjected to a "Fair Hearing" review and a hearing examiner was duly appointed and chosen to handle the case. The parties agreed that the issues would be decided by the hearing officer based on the administrative record and written pleadings and briefs. Following the filing of such documents, and a consideration of the record of the proceedings, the hearing officer issued a nine (9) page "Final Order" in the matter on or about May 28, 1992, totally reversing what the nine-member CON Review Board had decided. The result reached by the hearing examiner was *denial* of the Baptist CON application and the *approval* of the Alacare CON application. A-55a.

C. Disposition in the Circuit Court

In its Petition for Judicial Review in the Etowah County Circuit Court, Baptist argued that the result reached by the administrative law judge had been unsupported by the facts and by a proper application of the law to those facts. Baptist argued that there was no substantial legal basis for the hearing officer's conclusion that the CONRB action had been "arbitrary" or "capricious," especially in light of the testimony and evidence supporting approval of the Baptist application. Baptist pointed out the long line of cases from the appellate courts of Alabama wherein the principle has developed that "even in cases where the evidence is meager or the testimony generalized, it is not the province of the reviewing [entity] to substitute its judgment or pass upon the wisdom of the decision of the administrative agency charged by the Legislature with the responsibility for making such decisions." Relying upon, among others, the decisions of *State Health Planning Agency v. Rivendell of Alabama, Inc.*, 469 So.2d 613 (Ala. Civ. App. 1985) and *Hughes v. Jefferson County Board of Education*, 370 So.2d 1034 (Ala. Civ. App. 1979), Baptist argued that the Circuit Court should

reinstate the original decision in favor of Baptist and adverse to Alacare since it was amply supported by record evidence.

The Circuit Court agreed. It proceeded in its judicial review of the administrative record under the aegis of the Alabama Administrative Procedure Act, Section 41-22-1 *et seq.* of the *Code of Alabama (1975)*. Baptist did not seek to have the Circuit Court substitute its judgment for that of the SHPA, as to the weight of the evidence on questions of fact, but, rather, contended that the conclusions reached by the hearing examiner were not supported by the administrative record; they were affected by error of law; they were clearly erroneous in view of the substantial evidence on the whole record and they were unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. *See* Section 41-22-20(k) of the *Code of Alabama (1975)*. Put another way, Baptist argued that because the initial decision of the CONRB was amply supported by credible record evidence, the administrative law judge was not justified in reversing the Agency decision.

As Baptist pointed out in the trial court, the scope of the review by the SHPA Fair Hearing Officer is expressly limited to the following issues, *viz:*

> (a) Whether the application meets the requirements of Section 22-21-266, *Code of Alabama, (1975)*, with respect to inpatient facilities or services, if applicable, as well as **whether the application is consistent with each of the applicable criteria and standards set forth in Chapter 6 of these Rules, and whether the application is consistent with the appropriate State [Health] Plan;**

> **(b) Whether the State Agency acted in an arbitrary or capricious manner, without a reasonable justification for the decision or in the absence of fixed standards against which the application was measured,** or whether the State Agency otherwise abused its discretion in deciding among competing applications;
>
> (c) Whether the State Agency **materially failed to follow review procedures** as set out in these Rules and whether the error was substantial in its effect. (Emphasis added).

Section 410-1-8-.22 of the SHPA *Rules and Regulations (Rev. 1991)*. So long as the application under review meets the review criteria for the issuance of CON authority, it is clearly not the province of the "Fair Hearing Officer" to upset, modify or reverse the action of the CONRB. Baptist contended, and contends here today, that under this limited standard of review, the administrative law judge was not authorized to substitute his judgment for that of the CONRB itself and obliterate the reasonable and supported determination of the Agency tribunal. If there is credible legal evidence in the administrative record supporting the approval of the application, Baptist argued, and if the CONRB was reasonably justified in having decided this matter in favor of Baptist and against Alacare, then the analysis was due to end.

In essence, Baptist argued to Circuit Judge Rhea that since there was no evidence pointing to an abuse of discretion or error of law on the part of the SHPA's CONRB, or that the State Agency had materially failed to follow its own review procedures, the decision of the Fair Hearing Officer was, itself, an abuse of discretion. Since this was the case, the plaintiff argued, the decision was due to be set aside and the original SHPA decision reinstated. The trial court agreed, issuing its Memorandum

Opinion, Judgment and Injunction on or about June 10, 1993. A-5a. Circuit Judge Rhea found that the CONRB's decision had been reasonable, not arbitrary and capricious, and that it had been based upon adequate principles and fixed standards. The court found the Board had been justified in concluding that Baptist was the "most appropriate applicant" when compared with Alacare.

The Circuit Court further found that the original CONRB decision, and not that of the Fair Hearing Officer, was the administrative decision which was due to be upheld by the court. The court found the SHPA decision to have been "well reasoned and supported by the testimony and evidence" while the Fair Hearing decision was "poorly reasoned and unsupported by the testimony and evidence." Going further, the court wrote:

> According to the Alabama State Health Plan in effect at the time of filing of the Baptist application, Etowah County was an "underserved" area of our State. Therefore, according to the State Health Plan and SHPA (by means of the Staff Report), the Baptist project was susceptible to being approved by the CON Review Board. See, e.g., Alabama State Health Plan, 410-2-4.04 (8) (d) (4). Indeed, the Board's original ruling specifically found that the Baptist project was consistent with the State Health Plan and that Baptist had demonstrated a community need for additional home health services. The Board further reasonably found that Baptist was the more appropriate applicant, as contrasted with Alacare, the freestanding provider. The SHPA Staff Report noted no inconsistency of the Baptist project with the applicable provisions of the State Health Plan and, additionally, specifically found Etowah

County to be underserved in terms of home health services.

The Court notes that Alacare acknowledged these findings of SHPA and even acknowledged that Baptist was an appropriate applicant for CON approval. **Moreover, Alacare was apparently so convinced that Baptist would be approved by the SHPA for home health that Alacare encouraged the CON Review Board and the Fair Hearing Officer to approve both the Baptist application as well as the Alacare application.** When the matter went to the Fair Hearing Officer for review, following action in Baptist's favor by the CON Review Board, the single issue was whether the Board had acted arbitrarily and capriciously in selecting Baptist as the more appropriate applicant.

Alacare's contention to the Fair Hearing Officer was that it was the "more appropriate applicant" *simply because certain of its projected charges were lower than those projected by Baptist.* It contended that because this was the case, and because Alacare was proposing to "expand" its services into Etowah County, it should be approved.

It is without dispute, however, that facility charges are simply one of many considerations before the CON Review Board when it decides between competing CON applicants. SHPA's own regulations provide that the determination is "to be

> established from the evidence as to the ability of the person, directly or indirectly, to render adequate service to the public." Section 410-1-6-.09 of the SHPA *Rules and Regulations (Rev. 1991).* Among other things, the regulation states that this analysis must include professional capability; management capability and adequate manpower. **The record is replete with the information provided to the Board, by Baptist, regarding its ability to render this health service and why it is a more appropriate applicant to provide the service than Alacare.**

(Emphasis added). A-37a.

In essence, the Circuit Court found that the decision of the State Health Planning Agency had complied with the procedural and substantive mandates of state law and the Agency's own regulations and policies. The court further determined that the CON Review Board's decision was well supported in the evidence and that it was based upon adequate principles and fixed standards, comporting with the requirements of Alabama law and the SHPA's own rules and regulations. No constitutional issues were ever examined.

Alacare filed an appeal with the Alabama Court of Civil Appeals. On or about May 13, 1994, the intermediate Alabama court affirmed the Circuit Court's decision. A-1a. Contrary to the assertion of the Petitioner, the Court of Civil Appeals did **not** hold that the Board's "action in deviating from its normal criteria was not arbitrary, but was within the Board's discretion, and was thus reasonable." Indeed, the appellate court went to great lengths in its assessment of the method under which the trial court reached its decision, noting in particular that the Court of Civil Appeals "reviews the trial court's ruling with no presumption of

correctness, 'since that court was in no better position to review the order of the Board than we are.'" A-2a. However, the intermediate court made it clear that it found the action of the trial court reasonable and well supported in the evidence. In that regard, the Court of Civil Appeals stated:

> The Fair Hearing Officer's scope of review is limited to: (1) whether the CON application satisfies the statutory requirements; (2) whether SHPA made an arbitrary or capricious decision, or abused its discretion in deciding among competing applications or (3) whether SHPA materially failed to follow the review procedures and made a substantial error. SHPA *Rules and Regulations* Sec. 410-1-8-.22 (1) (a). The Fair Hearing Officer is prohibited from considering, inter alia, "the correctness, adequacy or appropriateness of the criteria, standards or plans by which the application was measured," and from substituting his judgment for SHPA's factual findings. SHPA *Rules and Regulations,* Sec. 410-1-8-.22 (1) (b) (b); see also: Sec. 410-1-8-.25 (3). The criteria for a CON include availability of alternatives; need for the project; population statistics and growth; effect on existing facilities or services; expansion of existing services being favored over the establishment of new facilities; community reaction; access to medically underserved groups and whether the project complements and supports the existing health care system. SHPA *Rules and Regulations,* Secs. 410-1-6-.04 to -.08; see also Ala. Code 1975, Section 22-21-264.

In its ruling approving Baptist's CON

application, the Board specifically noted that neither capital costs nor new construction was required for Baptist. In determining that Alacare was not the most appropriate applicant, the Board specifically noted, inter alia, that capital costs for Alacare were approximately $9,000. The Board further noted that issuing the CON to Baptist should not affect other providers because the area was underserved. Testimony at the public hearing also revealed that Baptist had an approximately 80-year history in the health field in Etowah County. The Board's ruling also expressly noted that Baptist proposed higher charges than those proposed by Alacare, and that Alacare had approval to operate home health services in several Alabama counties.

It appears of record that an important factor in the hearing officer's decision to reverse the Board's decision was the fact that Baptist proposed somewhat higher charges than Alacare; however, the hearing officer also concluded that the Board was justified in determining that approval of Baptist's application "would improve accessibility of such services by ensuring the availability of less costly alternatives to inpatient care" and "the grant of [Baptist's] application would improve the accessibility of services in the area." **It appears to this court that the Board gave considerable weight to the accessibility factor over the cost factor, and that the hearing officer impermissibly considered the appropriateness of the cost**

> **factor. In view of the Board's recognized expertise regarding CON approval, the weight assigned to the evidence presented to the Board is within the Board's discretion.** *Health Care Authority of the City of Huntsville v. State Health Planning Agency*, 549 So.2d 973 (Ala. Civ. App. 1989). **The hearing officer is prohibited from considering the appropriateness of the criteria by which the application was measured. SHPA *Rules and Regulations* Sec. 410-1-8-.22 (1)(b). Therefore, we find no error in the trial court's determination to reinstate the approval of the application for a CON filed by Baptist.**

(Emphasis added).

Alacare filed its Application for Rehearing, which the Court of Civil Appeals denied on or about June 17, 1994. A-53a. Following the denial, the Petitioner filed a petition for writ of certiorari with the Alabama Supreme Court. The petition was denied on or about February 3, 1995, after which time the Petitioner filed notice with the Circuit Court of Etowah County that it intended to ask this Court for a writ of certiorari to the Alabama Supreme Court.

The Petitioner seeks to frame a "federal" issue in this matter by asserting that the CON Review Board "arbitrarily deviated" from fixed review standards when it decided this matter in favor of Baptist and against Alacare. It argues that the action of the state agency "violates principles of substantive due process as protected by the Fourteenth Amendment."

The Respondent takes the position that no issue appropriate for review by the United States Supreme Court is presented. Indeed, this matter has always constituted a state law issue which

was decided in conformity therewith. If any "due process" considerations were ever implicated in this matter they were certainly **procedural** and not **substantive** in nature. This is underscored by the fact that there can be no legitimate argument that SHPA failed to act in accord with "adequate principles and fixed standards." The decision in favor of Baptist, and adverse to Alacare, specifically references the review standards and the sections of Alabama law and Agency regulations which are applicable to the circumstances.

Arguably, if the SHPA had made a decision without a hearing, or if the Agency had made a decision after receiving no legal evidence in support of the Baptist application, a "substantive due process" argument might have some bearing on these proceedings. However, for the reasons which follow, it will be amply clear that there is simply no basis for the Supreme Court's granting the Alacare petition herein.

SUMMARY OF THE ARGUMENT

Alacare failed to properly raise and preserve the alleged constitutional issue of deprivation of procedural or substantive due process in the hearings below and, moreover, the federal question purportedly presented on this petition was not squarely considered and resolved by the Alabama Court of Civil Appeals. Hence, there is no jurisdiction for this Court to grant the petition for writ of certiorari.

Even if Alacare had properly raised and preserved a constitutional argument, that fact alone is not tantamount to there being an actual constitutional issue before the Supreme Court. Indeed, this petition is merely an effort on the part of Alacare to delay the full implementation of the final judgment of an Alabama court of competent jurisdiction.

Rather than raising an issue of constitutional dimensions,

Alacare is asking the United States Supreme Court to substitute its judgment for the decisionmaking processes of the Alabama Court of Civil Appeals. In essence, this is a case where the Petitioner simply disagrees with the findings and conclusions of the highest state court to have heard this action and, now, is seeking to overturn the decision under the guise of a due process argument. For the reasons which follow, this Supreme Court should not sanction such activity. It should deny the petition without further proceedings.

REASONS FOR DENYING THE WRIT

I. ABSENCE OF SUBJECT MATTER JURISDICTION

The Petitioner candidly admits to understanding that it "bears the burden of persuading this Court of its jurisdiction over this petition **absent any express reference in the opinion of the court below to the federal constitutional provision upon which the Petitioner relied in that court.**" (Emphasis added). *Illinois v. Gates*, 462 U.S. 213, 218-220 (1983). It also recognizes the well settled principle that in order for the Court to assume jurisdiction over a case, the federal question presented in the case must be "either raised or squarely considered and resolved in state court." *Gates, supra*, 462 U.S. at 218 n.1. The Petitioner contends that while the claim of deprivation of substantive due process was never expressly raised or resolved below, in terms of a constitutionally grounded argument, that the matter was nevertheless litigated and is susceptible to a hearing before the Supreme Court.

The Respondent disagrees.

How does Alacare frame the issue? In brief, counsel state that the company "contends that the [CON Review] Board granted the CONs of three other facilities using the mandatory fixed set of standards which it does consider, but in deciding

between Alacare's and Baptist's applications, the Board, without reason, used a differently prioritized set of standards than with the prior applications. That arbitrary deviation from the fixed review standards caused the Board to conclude that Baptist was the 'most appropriate applicant,' thus awarding the CON to Baptist. Alacare contends that had the Board used its fixed set of standards, the Board would have only been able to select Alacare as the most appropriate application. That arbitrary and capricious use of different, inconsistent standards for deciding between competing CON applicants by the Board violates the due process rights of the Petitioner, Alacare. The constitutional question of due process violations, therefore, is the question which gives this Court jurisdiction to review the Petitioner's case."

It is instructive to note, however, that the alleged constitutional issue was not raised by Alacare in the agency and state court proceedings. While it is true that Alacare argued to the SHPA Fair Hearing Officer that the decision of the Board had been "arbitrary or capricious" — and that Alacare then made the same argument before Circuit Judge William Rhea in the Etowah County proceedings — ***such argument is a specifically enumerated basis for Alabama Administrative Procedure Act judicial review which is separate and apart from the argument of deprivation of substantive or procedural due process.***

Under Section 41-22-20 (k) of the *Code of Alabama (1975)*, the bases for Circuit Court judicial review are expressly set out, *viz:*

> * * * The Court may reverse or modify the decision or grant other appropriate relief from the Agency action, equitable or legal, including declaratory relief, if the Court finds that the Agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that Agency,

> or where no such statutory standards for judicial review are applicable to the Agency, if substantial rights of the Petitioner have been prejudiced because the Agency action is:
>
> (1) **In violation of Constitutional or statutory provisions;**
>
> (2) In excess of the statutory authority of the Agency;
>
> (3) In violation of any pertinent Agency rule;
>
> (4) Made upon unlawful procedures;
>
> (5) Affected by other error of law;
>
> (6) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or
>
> (7) **Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.**

(Emphasis added).

At every stage of the proceedings below, beginning with the challenge to the CON Review Board's decision before the Fair Hearing Officer, Alacare attacked the Agency decision *not* on the basis of a constitutional infirmity but, rather, on the basis that the conclusion reached by the Board had been "arbitrary or capricious" in terms of the application of the review criteria to the relevant facts.

Regardless of the creativity of the Petitioner, that argument cannot possibly be extrapolated into an argument that Alacare was somehow denied its constitutional right to procedural or substantive due process of law. At most, the Alacare argument has always been that the CON Review Board failed to give certain evidence the weight which Alacare said it was due, while the Board gave certain other evidence a weight which was different from what Alacare argued it should receive. That does not constitute a due process argument. Rather, Alacare has simply argued for the substitution of its judgment (through the Fair Hearing process) for that of the CON Review Board. When the Fair Hearing Officer substituted his judgment for that of the Board, the Circuit Court — along with the Alabama Court of Civil Appeals — said that he crossed over the bounds of his authority.

If Alacare had desired to raise a true constitutional claim, it could easily have done so in the proceedings below. At the time that Baptist obtained judicial review in the Circuit Court, Alacare could have asserted that the original decision of the CON Review Board had been defective in a due process sense. It could have argued that the decision was so unsupported by evidence as to constitute a deprivation of Alacare's fundamental right to a hearing before a neutral and detached decisionmaker. It could have argued that the Agency vote was so flawed that both procedural and substantive due process rights were violated. But Alacare did not make such arguments.

Rather, Alacare simply argued that the facts presented in the adminstrative hearing did not justify the decision reached by the Review Board. Accordingly, or so went the argument, the ultimate decision of the CON panel was due to be characterized as "arbitrary or capricious." The Alabama Administrative Procedure Act — under which the case was reviewed in the state circuit court proceedings — clearly and expressly provides *both* for an attack based on abuse of discretion and for one based on

alleged violations of constitutional safeguards. The former argument was made; the latter argument was not made.

Since Alacare never raised the constitutional argument below, it cannot be heard to complain for the first time to the Supreme Court on a petition for writ of certiorari. To its credit, Alacare says at page seven of its petition that it "acknowledges that it did not mention specifically the substantive due process clause in its argument," but, yet and still, that "the Fourteenth Amendment prohibition against arbitrary and capricious government action was and remains the basis of the argument at issue in the instant case." Alacare seeks to overcome its obvious failure in not having raised the constitutional claim by saying that "[t]he issue of the unconstitutionality of the Board's actions is simply an enlargement of the 'arbitrary and capricious nature' argument which has been considered throughout this cause of action. . . . Therefore, the issue of whether questions can be considered by the Alabama Supreme Court that are not timely or directly raised is established by the actual practice and decisional law of that court."

Yet it is without dispute, of course, that the Alabama Supreme Court did not rule on the merits of this matter. By order dated February 3, 1995, the Supreme Court of Alabama denied the petition for writ of certiorari filed by Alacare. A-54a. It is equally true (and clear) that the Alabama Court of Civil Appeals conducted its "arbitrary and capricious" analysis on state law grounds rather than under the Fourteenth Amendment.

Citing Section 41-22-20 (k) of the *Code of Alabama (1975)*, the Court of Civil Appeals found the Fair Hearing Officer's decision was "not only not supported in the record, but it is not supported by existing case law. In *Sexton v. Tuscaloosa County Civil Service Board*, 426 So.2d 432 (Ala. Civ. App. 1983), the Court of Civil Appeals of Alabama stated: 'A decision is not arbitrary where there is a **reasonable justification** for the

decision or where the determination is founded upon adequate principles or **fixed standards.'** *Sexton,* 426 So.2d at 435 (emphasis in original)."

"In this case, there have always been 'fixed standards' upon which the decision was grounded. These fixed standards are found in Section 22-21-264 of the *Code of Alabama (1975)* and the agency regulations. The statute, and accompanying regulations, provide the findings prerequisite to the issuance of a Certificate of Need for home health services. There is evidence in the record indicating a clear and unmet need for additional home health services in the Etowah County health service area. There is ample evidence showing that Baptist is prepared, and has the necessary capabilities, to meet that need. **Therefore, there was reasonable justification for SHPA's approval of Baptist and its denial of Alacare. The decision, therefore, was not arbitrary or capricious as a matter of law."** (Emphasis added). A-48a - 49a.

Even in the conclusion reached by the Court of Civil Appeals, it is clear that no Fourteenth Amendment analysis was requested or conducted. "Even in cases where the evidence has been meager or the testimony 'generalized,' the courts of Alabama have held that it is not the province of the reviewing entity to substitute its judgment, or pass upon the wisdom of the decision of the administrative agency charged by the Legislature with the responsibility of making such decisions. *See, e.g., Hughes v. Jefferson County Board of Education,* 370 So.2d 1034 (Ala. Civ. App. 1979); *State Health Planning Agency v. Rivendell of Alabama, Inc.,* 469 So.2d 613 (Ala. Civ. App. 1985).

". . . In this case, there was more than ample evidence to support the CON Review Board's original approval of the Baptist application. Therefore, the approval of Baptist, and the concurrent denial of Alacare, cannot be said to have been 'arbitrary' or 'capricious.' " A-50a - 51a.

Alacare cannot reasonably contend that it properly raised a substantive due process argument in the proceedings below. At most, it asserted that there was an inconsistent interpretation of SHPA *Rules and Regulations* between the Alacare/Baptist decision and other decisions related to home health agency applications. Such a proposition goes to the argument that the CON Review Board abused its discretion, or was arbitrary, in how it decided cases dealing with the same subject matter. That type of argument is a far cry, under any interpretation, from a claim of deprivation of substantive due process. In the main, the argument is one which is more related to the proper *weight* the SHPA should have given to the evidence before it in different cases.

Since the Alacare arguments below were centered around the contention that the CON Review Board gave more weight to the so-called "cost factors" in one set of cases and less weight to the "cost factors" in another set, no constitutional claim is raised. There were a myriad of other review criteria which were considered *in addition to the costs associated with the establishment of the new institutional health services.* Clearly, some of the applicants may have been considered more favorably than others — even if they proposed higher total project costs — because their applications were so superior to the competitor applicants in other (*e.g.*, non-cost) areas. It is well settled that the United States Supreme Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 95 L. Ed. 2d 474, 107 S. Ct. 1940 (1987); *Webb v. Webb*, 451 U.S. 493, 496-497, 68 L. Ed. 2d 392, 101 S. Ct. 1889 (1981).

In the proceedings below, Alacare never adequately or properly presented a constitutional claim for denial of substantive due process of law. The Petitioner only asserted

"arbitrary or capricious" conduct by the state agency — under the aegis of the state Administrative Procedure Act — before the Alabama Court of Civil Appeals. The Alabama Supreme Court refused to hear the case, denying the petition for writ of certiorari without opinion. When " 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in [the United States Supreme Court] can affirmatively show the contrary.' *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n. 3, 76 L. Ed. 2d 497, 103 S. Ct. 2296 (1983) (quoting *Fuller v. Oregon*, 417 U.S. 40, 50, n. 11, 40 L. Ed. 2d 642, 94 S. Ct. 2116 (1974) (quoting *Street v. New York*, 394 U.S. 576, 582, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969))." In this case, Alacare has made no such showing.

For the reasons assigned, Respondent Baptist suggests that the Supreme Court has no basis for assuming jurisdiction over this petition. The issue of substantive due process was never properly raised or preserved in the proceedings below and, therefore, cannot be raised for the first time in pleadings filed with the United States Supreme Court.

II. AGENCY DECISION DID NOT IMPLICATE CONSTITUTIONAL RIGHTS OF PETITIONER.

Even if the Supreme Court were to conclude that the issue of an alleged deprivation of substantive due process had been properly raised and preserved below, it is clear beyond any reasonable argument that the facts in this case do not support the granting of certiorari. Even when the facts stated under the petition are reviewed in the light most favorable to Alacare, yet and still it is obvious that what Alacare complains of is not a deprivation of a federal constitutional right. Rather, Alacare complains because it simply disagrees with the merits-based decision of a state adminstrative agency. Instead of utilizing the appellate process to review previously raised, genuine,

constitutional claims, Alacare would apparently have this Court operate in the fashion of a state court of last resort. In essence, Alacare merely wants "one more bite at the apple." It is not presenting a *bona fide* constitutional claim at all. For such reason, the petition is due to be rejected without further proceedings.

While it is true that the Due Process Clause of the Fourteenth Amendment to the United States Constitution comprises a "general prohibition against arbitrary and unreasonable governmental action," *Thompson v. Gallagher,* 489 F.2d 443, 446 (5th Cir. 1973), it is also true that not every action taken by a governmental entity can be properly categorized as "arbitrary and unreasonable" simply because the adversely affected party disagrees with the merits-based decision of the subject agency or board. Further, it is beyond debate that not every arbitrary action of a governmental agency or board — even when proved with clear and convincing evidence — constitutes activity rising to the level of constitutional dimensions.

Procedural due process mandates that the governmental machinery utilized to adjudicate private property rights function properly and that it afford the process which the person or entity affected is due. Substantive due process, on the other hand, deals with governmental action which is unlawful and unconstitutional regardless of the procedural safeguards which accompany the complained of conduct. Charitably said, there is "no way" that Alacare can possibly contend in good faith that the State Health Planning Agency (or Baptist) deprived it, in this matter, of its constitutional right to substantive due process of law. For the reasons which follow, such an argument must be utterly rejected as frivolous and without merit.

There is a very basic difference between a procedural due process claim and a claim grounded on alleged violations of substantive due process. When the claim centers around substantive due process arguments, the relevant inquiry involves

"an assessment of the constitutionality of the action itself," irrespective of the available (provided) procedural safeguards and protections. *See, e.g., Hudson v. Palmer,* 104 S. Ct. 3194 (1984); *Augustine v. Doe,* 740 F.2d 322, 326 (5th Cir. 1984); *Wolff-Lillie v. Sonquist,* 699 F.2d 864, 871 (7th Cir. 1983); *Owen v. Lash,* 682 F.2d 648, 651 (7th Cir. 1982) (Justice Stewart, sitting by designation). This distinction exists because "there are certain government actions that, even if undertaken with a full panoply of procedural protection, are, in and of themselves, antithetical to fundamental notions of due process." *Parratt v. Taylor,* 451 U.S. 527, 545 (1981) (Blackmun, J., concurring). Regarding substantive constitutional rights, "the constitutional violation is complete at the moment when the harm occurs." *Gilmere v. City of Atlanta,* 774 F.2d 1495, 1500 (11th Cir. 1985) (*en banc*). This is the case with both specifically enumerated constitutional rights as well as rights such as the right to be free from excessive force which is protected under the aegis of "substantive due process." *Gilmere, supra.*

In the matter at bar, it is difficult to imagine how Alacare contends that it was deprived of substantive due process protections. In order for that to be the case, Alacare would necessarily have to show this court that — for example — it had its authority to do business confiscated without any kind of a hearing at all. In other words, there would need to be a showing that the State of Alabama engaged in an intentional, wrongful, taking of the property of the Petitioner, not merely that some hearing which was conducted was defective or deficient.

Another example might be where there were no fixed standards or guiding principles for the state agency to use in coming to its decision between competing CON applicants. If the CON Board, for example, had no structure to its decisionmaking system, nor a meaningful post-judgment judicial review process, and the parties appearing before the Board had no way of knowing the principles to be utilized by the Board in coming to its

decision, then and in such event there could be a stated violation of substantive due process. Even then, the facts would have to be carefully evaluated and assessed before coming to a final decision.

In this case, though, it is quite clear that none of these issues exists.

In the matter at hand, adequate principles and fixed standards are set out in the CON statute and in the SHPA *Rules and Regulations*. The parties are advised, well in advance of filing applications and participating in hearings, what will and what will not be considered as relevant evidence and testimony. The decisionmaking process takes place in an open hearing, attended by the public and wherein parties can appear alone or with legal representation. The voting takes place at the public hearing, by uplifted hands upon motions duly made and seconded. The final decision of the state agency is reduced to writing, and reasons for CON approvals or denials are included in the final orders which are issued to the parties. A meaningful system of post-judgment judicial review is in place.

Just as important as the procedural machinery itself, the CON Review Board considers a wide array of factors in coming to its decisions. Only *one* of the many factors in this case was the cost associated with the Alacare and Baptist projects. As a matter of fact, it is instructive to note that the Circuit Court, in reversing the action taken by the hearing examiner, expressly enumerated many of the considerations which went into the Board's initial decision. The Circuit Court, correctly finding under the Alabama statute that the court's review was required to be "a narrow one," explained the basis for its action, *viz:*

> Because the Fair Hearing officer was obligated by regulation to simply review (1) whether the Baptist application's approval

> was consistent with the applicable provisions of the State Health Plan; (2) whether SHPA acted in an arbitrary or capricious manner "without a reasonable justification for the decision or absent fixed standards against which the application was measured" and (3) if the agency "materially failed to follow [its] review procedures," the court's review is a narrow one. Aside from the issue of whether Alacare had standing to pursue a Fair Hearing decision in light of its withdrawal of further opposition to the Baptist project, **the question before this court is whether the Fair Hearing Officer exceeded his authority in reversing the CONRB's earlier findings.**

(Emphasis added). A-12a, 13a.

Without reciting all the findings of the Circuit Court, it is clear from the record that an extensive and exhaustive review of the administrative record was conducted before a decision was reached in the case below. If this court reviews the findings of fact and conclusions of law made and entered by the circuit court, and later affirmed by the Court of Civil Appeals, it will become crystal clear that Alacare was afforded both procedural and substantive due process of law. There was nothing "arbitrary" about the CON Board's decisionmaking process; rather, the only obviously "arbitrary" conduct was that demonstrated by the Fair Hearing Officer's reversal of the initial Board decision.

As some indication of the extent to which the Board had lawful grounds for its merits-based decision in favor of Baptist and adverse to Alacare, the circuit court enumerated some of the areas of evidence which are contained in the administrative record before SHPA. They include, but are not limited to: (a) no

capital costs associated with the project for Baptist; (b) no new construction associated with the establishment of the home health service; (c) anticipated charges are reasonable, even if somewhat higher than Alacare; (d) population to be served is large enough to support additional provider; (e) Etowah County shown as an "underserved" county under the applicable State Health Plan; (f) projected breakdown on revenue between private pay, third party payors, Medicare and Medicaid appears reasonable; (g) Baptist capable of providing skilled nursing services, personal care, physical therapy, speech therapy, occupational therapy, medical social services and medical supplies onsite; (h) applicant already has existing private-duty nursing service and a track record of having provided home health services in Etowah County on a contract basis for Etowah County Health Department; (i) hospital-based home health agency, as contrasted with freestanding services, offers significant advantages of greater continuity of patient care; (j) specialty services can be offered through the Baptist parent corporation which are not immediately available through Alacare's operations; (k) provision of home health services through the hospital expected to reduce the average length of stay of Baptist patients and thereby reduce overall patient costs in the community, a goal which is totally consistent with the overall purpose of the health planning and development program; (l) Baptist has recognized experience in the delivery of home health services; (m) patient needs identified by Baptist coincide with the needs shown and identified under the applicable Alabama State Health Plan; (n) because hospital plans to emphasize and focus on provision of services, primarily, to its own patients, there is expected to be little adverse impact upon other existing home health providers in the health service area; (o) Baptist has longstanding referral, linkage and transfer agreements with other health care providers inside and outside Etowah County; (p) Baptist' proposal would be quicker and less expensive to implement than a new, start-up, home health organization which does not have a presence in the county to begin with and (q)

regional hospitals such as Baptist have advantages over freestanding home health agencies. Those include: (1) the ability to reduce hospital costs and thereby reach a greater number of underserved areas and patients; (2) access to substantial inpatient revenues, giving the hospital-based agency financial flexibility that is often lacking in a freestanding setting; (3) the strong employment of qualified health care professionals with a number of different skills; (4) the capability to become involved in IV therapy services, durable medical equipment; home respiratory care; home nutrition; pain management and other health care fields related to support of the hospital's "core" business of inpatient and outpatient care and (5) the ability to strengthen the continuum of care for both the hospital and the home health patients because of the bridge which then exists between acute care and home care services.

The above items are by no means all-inclusive of what the CON Review Board — and later the circuit court — considered as relevant evidence. But as some indication of how the circuit court felt about the evidence, Judge Rhea wrote as follows, *viz:*

> It is clear to the court that the administrative agency fact finders were very interested in review criteria **beyond the "charge data" related to the cost per home health visit.** While charges can (and should) obviously be considered, they are certainly not intended to be dispositive of the Board's decision in cases such as this one. The court, accordingly, cannot conclude that Alacare is entitled to prevail in this action simply (or even primarily) because of a comparison of "charge data" between the two applicants. **Such a conclusion would constitute an "apples and oranges" type comparison.**

(Emphasis added). A-30a.

Going still further, after a lengthy analysis of the facts, the circuit court came to a related conclusion of law. In deciding to uphold the original CONRB decision in favor of Baptist, the court wrote as follows, *viz:*

> Alacare's contention to the Fair Hearing Officer was that it was the "more appropriate applicant" simply because certain of its projected charges were lower than those projected by Baptist. It contended that because this was the case, and because Alacare was proposing to "expand" its services into Etowah County, it should be approved.
>
> It is without dispute, however, that **facility charges are simply one of many considerations before the CON Review Board when it decides between competing CON applicants.** SHPA's own regulations provide that the determination is "to be established from the evidence as to the ability of the person, directly or indirectly, to render adequate service to the public." Section 410-1-6-.09 of the SHPA *Rules and Regulations* (*Rev. 1991*). Among other things, the regulation states that this analysis must include **professional capability; management capability and adequate manpower.** ***The record is replete with information provided to the Board by Baptist, regarding its ability to render this health service and why it is a more appropriate applicant to provide the service than Alacare.***

(Emphasis added). A-37a.

Alacare contends that it suffered substantive due process deprivation because the CON Review Board used "a different set of decisional criteria in [the instant] case, where in prior decisions the Board consistently was concerned with cost factors." Yet such argument obviously ignores the undisputed fact that *numerous considerations other than cost and accessibility* were relied upon in the Board's decisionmaking process. It is just impossible to contend, in good faith, that those were the "only" — or even the primary — factors which the CON Review Board used in coming to its final decision.

CONCLUSION

This case involves little more than Alacare's dissatisfaction with the merits-based decision of the Alabama State Health Planning Agency. It does not involve constitutional deprivations, procedural or substantive.

Because the hearing below comported with the fundamental requirements of procedural and substantive due process, and because the due process argument was never properly raised or preserved in the proceedings below, the Respondent respectfully suggests that the Supreme Court should deny the Alacare petition without further delay. The opinion of the highest court in Alabama to decide this case, the Alabama Court of Civil Appeals, is entirely correct and the decision clearly does not involve any matters of constitutional dimensions. If Alacare had any desire to raise such a claim, and preserve it for possible appeal to the United States Supreme Court, it should have done so much earlier than today.

Respectfully submitted,

JUSTICE D. SMYTH, III
Counsel of Record
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Attorneys for Respondent

APPENDIX A

ALABAMA
COURT OF CIVIL APPEALS

OCTOBER TERM, 1993-94

AV92000673

ALACARE HOME HEALTH SERVICES, INC.

v.

BAPTIST HOSPITAL OF GADSDEN, INC.

Appeal from Etowah Circuit Court

(CV-92-695)

THIGPEN, Judge

This case involves competing applications for a certificate of need (CON).

Baptist Hospital of Gadsden (Baptist) and Alacare Home Health Services (Alacare) each applied to the State Health Planning Agency (SHPA) for a CON for authority to establish and operate home health services in the same service area. Only one application could be approved. Initially, the SHPA CON Review Board (Board) approved Baptist's application. Alacare subsequently requested a fair hearing, pursuant to Ala Code 1975, § 22-21-275(14). The hearing officer reversed the Board's decision and approved Alacare's application. Pursuant to Baptist's petition for judicial review of the hear-

ing officer's decision, the trial court reinstated the Board's original decision to award the CON to Baptist. Alacare's post-judgment motion was denied. Hence, this appeal.

The dispositive issue on appeal is whether the trial court erred in reversing the hearing officer's decision to award the CON to Alacare and reinstating the Board's decision to award the CON to Baptist.

Initially, we note that a decision by a state agency is presumed to be correct and will be affirmed unless it is arbitrary or capricious or fails to comply with applicable law. *State Health Planning & Resource Development Administration v. Rivendell of Alabama, Inc.*, 469 So. 2d 613 (Ala. Civ. App. 1985). The decision of the fair hearing officer is the final decision of the Board. Ala. Code 1975. § 21-22-275(14); *Methodist Homes for the Aging Corp. v. Stewart*, 594 So. 2d 161 (Ala. Civ. App. 1992). Further, this court reviews the trial court's ruling with no presumption of correctness, "since that court was in no better position to review the order of the Board than we are." *Rivendell* at 614.

The fair hearing officer's scope of review is limited to: (1) whether the CON application satisfies the statutory requirements; (2) whether SHPA made an arbitrary or capricious decision, or abused its discretion in deciding among competing applications; or (3) whether SHPA materially failed to follow the review procedures and made a substantial error. SHPA Rules and Regulations § 410-1-8-.22(1)(a). The fair hearing officer is prohibited from considering, inter alia, "the correctness, adequacy, or appropriateness of the criteria, standards or plans by which the application was measured," and from substituting his judgment for SHPA's factual findings. SHPA Rules and Regulations § 410-1-8-.22(1)(b)1.; see also § 410-1-8-.25(3). The criteria for a CON include availability and advantages of alternatives; need for the project; population statistics and growth; effect on exist-

ing facilities or services; expansion of existing services being favored over the establishment of new facilities; community reaction; access to medically underserved groups; and, whether the project complements and supports the existing health care system. SHPA Rules and Regulations §§ 410-1-6-.04 to -.08; see also Ala. Code 1975 § 22-21-264.

In its ruling approving Baptist's CON application, the Board specifically noted that neither capital costs nor new construction was required for Baptist. In determining that Alacare was not the most appropriate applicant, the Board specifically noted, inter alia, that capital costs for Alacare were approximately $9,000. The Board further noted that issuing the CON to Baptist should not affect other providers because the area was underserved. Testimony at the public hearing also revealed that Baptist had an approximately 80-year history in the health care field in Etowah County. The Board's ruling also expressly noted that Baptist proposed higher charges than those proposed by Alacare, and that Alacare had approval to operate home health services in several Alabama counties.

It appears of record that an important factor in the hearing officer's decision to reverse the Board's decision was the fact that Baptist proposed somewhat higher charges than Alacare; however, the hearing officer also concluded that the Board was justified in determining that approval of Baptist's application "would improve accessibility of such services by ensuring the availability of less costly alternatives to in-patient care" and "the grant of [Baptist]'s application would improve the accessibility of services in the area." It appears to this court that the Board gave considerable weight to the accessibility factor over the cost factor, and that the hearing officer impermissibly considered the appropriateness of the cost factor. In view of the Board's recognized expertise regarding CON approval, the weight assigned to the evidence pre-

sented to the Board is within the Board's discretion. *Health Care Authority of the City of Huntsville v. State Health Planning Agency*, 549 So. 2d 973 (Ala. Civ. App. 1989). The hearing officer is prohibited from considering the appropriateness of the criteria by which the application was measured. SHPA Rules and Regulations § 410-1-8-.22(1)(b). Therefore, we find no error in the trial court's determination to reinstate the approval of the application for a CON filed by Baptist.

AFFIRMED.

Robertson, P.J., and Yates, J., concur.

APPENDIX B

IN THE CIRCUIT COURT OF ETOWAH COUNTY, ALABAMA

Civil No. CV-92-695-WHR

BAPTIST HOSPITAL OF GADSDEN, INC., an Alabama nonprofit corporation,
Plaintiff,

vs.

DERRELL O. FANCHER, ETC., *et al.*,
Defendants.

MEMORANDUM OPINION

I. INTRODUCTION

This case is before the Court upon a review of the administrative record, as supplemented, regarding two Certificate of Need ("CON") applications filed with the State Health Planning Agency ("SHPA") by Baptist Hospital of Gadsden, Inc. ("Baptist") and Alacare Home Health Services, Inc. ("Alacare"). Both applicants sought approval from the health regulatory agency for authority to establish and operate home health services in the Etowah County, Alabama, service area. Because the applicants were subjected to a "comparative review" under applicable SHPA procedures, only one of the two applicants could be approved for the service. The approval of one of the applicants, of necessity, results in the denial of the other.

The facts associated with the Petition for Judicial Review have their origin in certain public hearings conducted in Montgomery on December 3, 1991, before the

Certificate of Need Review Board ("CONRB") of the SHPA. In those hearings, the Board approved the Baptist plans to establish and operate a home health agency in Etowah County. The decision of the CONRB came following the reception of relevant testimony and evidence from Baptist, under SHPA Project No. AL-91048, and a similar presentation of testimony and evidence from another home health applicant seeking CON authority, Alacare, which was proceeding under the aegis of SHPA Project No. AL-91090.

At the conclusion of the hearing, Board member Hannah Brock moved to approve SHPA Project No. AL-91048 (Baptist) and to deny SHPA Project No. AL-91090 (Alacare). The motion was duly seconded by Board member Jim Purcell and it carried by a vote of three (3) to two (2). Accordingly, the Baptist project was deemed approved because a quorum of the CONRB, by a majority vote of the members voting, had indicated their support for the Baptist project and their rejection of the Alacare project. Section 410-1-8-.05(1) of the SHPA *Rules and Regulations (Rev. 1991).*

The decision of the Board was later subjected to a "Fair Hearing" review [Section 22-21-275(14) of the *Code of Alabama 1975*] and a hearing examiner was duly appointed and chosen to handle the case. The parties agreed that the issues would be decided by the hearing officer based on the administrative record and written pleadings and briefs. Following the filing of such documents, and a consideration of the record of the proceedings, the hearing officer issued a nine (9) page "Final Order" in the matter on or about May 28, 1992, totally reversing what the nine-member CON Review Board had decided. The result reached by the hearing examiner was *denial* of the Baptist CON application and the *approval* of the Alacare CON application.

It is that decision of the "Fair Hearing" which forms the basis of the Petition for Judicial Review filed herein

by Baptist Hospital. For the reasons which follow, the Court finds that the hearing examiner acted beyond his authority in taking the action complained of in this appeal. Baptist, therefore, is entitled to a nullification of the decision rendered by Mr. Wilkerson and a reinstatement of the initial decision of the CON Review Board.

II. FINDINGS OF FACT

A. *Initial Procedural History of the Case*

This Certificate of Need case deals with the health planning and development regulatory scheme under which all Alabama health care facilities and providers operate.

The State Health Planning Agency ("SHPA") is an agency of the State of Alabama which is currently designated as the sole state health planning and development entity. It administers the state Certificate of Need ("CON") program. A "CON" is a state approval or permit required by law before any person or entity may acquire, constuct or operate a new institutional health service or facility in Alabama. Section 22-21-260 *et seq.* of the *Code of Alabama 1975*. It is a violation of state law for any new institutional health service or facility to be offered or developed in Alabama in the absence of CON approval therefor.

Generally speaking, applicants for CON approval initiate their request for SHPA review by the filing of a "Letter of Intent" or "LOI" with the state agency. Section 410-1-7-.05 of the SHPA *Rules and Regulations (Rev. 1991)*. The LOI must be submitted by the applicant at least thirty (30) days prior to submission of a formal CON application, and is designed, essentially, to place the SHPA and other interested parties on notice that the applicant intends to seek state authority for the offering or development of a new institutional health service or facility.

Acting on behalf of Baptist, Robert J. Corey, Executive Vice President for Baptist Memorial Hospital, Gadsden, filed such a Letter of Itent on or about February 5, 1991. (Baptist Record at p. 03). In timely fashion, on or about March 22, 1991, Baptist filed its actual Certificate of Need application with SHPA. (Baptist Record at pp. 04-33). Section 410-1-7-.05(1) of the SHPA *Rules and Regulations (Rev. 1991).*

In similar fashion, Alacare Home Health Services, Inc. ("Alacare") filed a Letter of Intent with SHPA for the provision of home health services in the Etowah County service area. The LOI was subsequently followed by the filing of a CON application on or about March 29, 1991. (Alacare Record at pp. 06-51). Both Alacare and Baptist sought SHPA approval for the offering of home health agency services in Etowah County, Alabama.

Under SHPA practice and procedure, a review mechanism known as "batching" is employed in the processing and determination of CON applications "pertaining to similar types of services, facilities or equipment affecting the same health service area." So-called "batch eligible projects" are defined as those "facilities, services and equipment which are finite in number (such finite number being greater than zero) as defined by the State Health Plan." Section 410-1-7-.19(2) of the SHPA *Rules and Regulations (Rev. 1991).* Because Baptist and Alacare both proposed to offer home health services to residents of the Etowah County, Alabama, health service area, SHPA determined that the applications should be "batched" or "comparatively reviewed" by the CON Review Board. Under such procedure, the CONRB members hear all of the relevant testimony and evidence on both CON applications prior to making decisions on either application. No action is taken on any application being "comparatively reviewed" with some other application until the Board first has the opportunity to hear and evaluate all the relevant testimony and evidence. This

includes oral presentations by live witnesses; the CON applications themselves; the SHPA Staff Reports on all "batched" applications; the documentary evidence supplied by the parties and any legal authorities or arguments which the applicants, or their counsel, may decide to present to the Board for its consideration.

After the two applications were "batched" for review by the CONRB, along with an application filed by a third party, ABC Home Health of Alabama, Inc. ("ABC"), ABC requested that the applications be reviewed under the so-called "contested case proceedings" provisions of the SHPA regulations and the Alabama Administrative Procedure Act, Section 41-22-1 *et seq. Code of Alabama 1975*. SHPA's Executive Director assigned the projects to a hearing officer for a contested case hearing, pursuant to such request of ABC. On or about November 20, 1991, counsel to ABC withdrew its intervention and its request for "contested case" proceedings before the hearing examiner. (Alacare Record at p. 109). In response, hearing examiner Mark Montiel cancelled the "contested case" proceedings and remanded the remaining two applications (e.g., Baptist and Alacare) to the CON Review Board for a comparative review. (Alacare Record at p. 111). The project proposed by ABC was ultimately withdrawn altogether from SHPA consideration, by Notice of Withdrawal filed on or about November 25, 1991. (Alacare Record at p. 183).

The CON applications of Baptist and Alacare were scheduled for consideration at the regular meeting of the CON Review Board on or about December 3, 1991. At that public hearing, all the relevant testimony and evidence presented by both applicants was received and considered by the CON Review Board. Following the reception of all the testimony and evidence on both applications, the Board voted to approve the Baptist application (SHPA Project No. AL-91048) and to deny the Alacare application (SHPA Project No. AL-91090). (Alacare Record at pp. 153-158).

On or about December 23, 1991, Alacare filed a Request for Reconsideration with SHPA. Under that request [See: Section 410-1-8-.09 of the SHPA *Rules and Regulations (Rev. 1991)*] Alacare sought a review of the majority decision with respect to both the Baptist and the Alacare projects. (Alacare Record at pp. 139-147). At the public hearings conducted by SHPA on January 14, 1992, the CON Review Board, having a quorum present, did not determine by a majority vote of a quorum of its members present that "good cause" had been shown by Alacare which would justify granting reconsideration. (Alacare Record at p. 165). Accordingly, by operation of law, the Alacare Request for Reconsideration was deemed denied as of January 14, 1992. Section 410-1-8-.14 of the SHPA *Rules and Regulations (Rev. 1991)*.

On or about January 23, 1992, Alacare filed its Request for Fair Hearing with SHPA. Section 410-1-8-.16 of the SHPA *Rules and Regulations (Rev. 1991)* and Section 22-21-275(14) of the *Code of Alabama 1975*. (Alacare Record at p. 164). John Beard, who is an attorney and who is also Executive Director of Alacare, filed the petition for Alacare "in its capacity as applicant in AL-91010 and as an Intervenor in AL-91048." Specifically, Alacare sought Fair Hearing review of the "adverse determination in the matter of [the Alacare application] and the granting of a CON [in favor of Baptist]." (Alacare Record at p. 164). Under the CON statute itself, a Fair Hearing is a further administrative remedy available to "applicants" with regard to "adverse decision[s]" by SHPA. Section 22-21-275(14) of the *Code of Alabama 1975*. Clearly, the statute provides that Alacare had the right to seek a Fair Hearing review with regard to its own application's *denial* but the language is absolutely silent with respect to whether Alacare had a simultaneous right to seek a Fair Hearing with regard to the Baptist application's *approval*.

In any event, whether Alacare had a clear legal right to oppose the Baptist approval and seek Fair Hearing

review of the same, the administrative record makes clear the fact that, by Joint Stipulation entered into on or about the 13th day of March, 1992, Alacare and Baptist stated that "all opposition to, and intervention in, either project by either party are hereby withdrawn." (Baptist Record at p. 145). The parties encouraged the Fair Hearing Officer to approve both applications for home health services, on the basis that "the need for home health services in Etowah County will adequately support approval of both projects." Nevertheless, by means of a decision on April 22, 1992, Fair Hearing Officer Mark Wilkerson opined that "granting of two applications in Etowah County would be in violation of [SHPA] Planning Policy 5 and is, therefore, beyond the Board's authority, notwithstanding the fact that all parties to the Fair Hearing are agreeable to such a stipulation." (Baptist Record at p. 151). Based on such finding, the Fair Hearing Officer refused to approve both applications and a suggested remand order supplied to him by counsel to the parties. The determination by the Fair Hearing Officer that two projects could not be approved in Etowah County had no effect whatsoever, however, upon the withdrawal of any further "opposition to, and intervention in, either project by either party." Such stipulation remained unaffected by the Fair Hearing Officer's refusal to approve both projects and the stipulation was never rescinded or nullified by any action by either Baptist or Alacare.

Despite the filing of the withdrawal of any further opposition to the Baptist approval, the Fair Hearing Officer proceeded to judgment under the Fair Hearing Request filed by Alacare. He ordered the parties to file briefs on their respective positions in the matter and, by written order dated May 28, 1992, Fair Hearing Officer Wilkerson totally reversed the decision which had been rendered by the SHPA's CON Review Board. The ultimate outcome of the decision was to deny the Baptist application and approve the Alacare application. (Baptist Record at pp. 198-207).

A timely Notice of Appeal, with appropriate Security for Costs, was then filed on behalf of Baptist by its legal counsel. (Baptist Record at pp. 217-220). On or about July 22, 1992, the Petition for Judicial Review was filed with the Clerk of the Circuit Court of Etowah County. (Baptist Record at pp. 221-231).

B. *Relevant Substantive Facts*

The Court is constrained to note that the facts relevant to its disposition of this matter are not in dispute. In view of the fact that this matter must be decided by the Court on the administrative record certified by the State Health Planning Agency, there is no additional testimony or evidence (save that filed by way of supplementation by Bapist) which this Court need consider. The decision, moreover, turns upon an application of the law to the facts rather than upon some determination of which disputed facts may be correct and which may be incorrect. Said another way, this Court is reviewing the same facts and record as the Fair Hearing Officer reviewed. Accordingly, there is no *ore tenus* presumption attending the findings of the administrative law judge. See, e.g., *Vann Express, Inc. v. Bee Line Express, Inc.*, 347 So.2d 1353 (Ala. 1977); *Harbin v. Alabama Public Service Commission*, 474 So.2d 63 (Ala. 1985). The Fair Hearing Officer did not hear live testimony and evidence; rather, he decided the case on the administrative record below and the arguments and authorities submitted by respective counsel to the parties.

Because the Fair Hearing Officer was obligated by regulation to simply review (1) whether the Baptist application's approval was consistent with applicable provisions of the State Health Plan; (2) whether SHPA acted in an arbitrary or capricious manner "without a reasonable justification for the decision or absent fixed standards against which the application was measured" and (3) if the agency "materially failed to follow [its] review procedures," the Court's review is a narrow one. Aside from

the issue of whether Alacare had standing to pursue a Fair Hearing decision in light of its withdrawal of further opposition to the Baptist project, the question before this Court is whether the Fair Hearing Officer exceeded his authority by reversing the CONRB's earlier findings.

In deciding whether the Baptist application met the requirements of the applicable sections of the Alabama State Health Plan, this Court considers the following facts, *viz:*

1. The findings contained in the written Ruling of the Certificate of Need Review Board (Baptist Record at pp. 153-154) are amply supported by the record evidence. Such findings include:

(a) The fact that there are no capital costs associated with the approval of this home health agency project;

(b) The fact that there will be no new construction associated with the approval of the application and the establishment and operation of the home health agency by Baptist Memorial Hospital;

(c) That charges are expected to be approximately $91.65 per visit for nursing; $82.74 for physical therapy; $94.77 for speech therapy; $90.19 for occupational therapy; $124.63 for medical social services and $52.98 for home health aide services;

(d) The fact that the total population to be served by this agency, in Etowah County alone, includes 106,875 (of which, 16,390 are age sixty-five or older);

(e) That this project should not affect other providers because, in accordance with federal law, all hospital patients who are in need of home health care have the right to choose any agency legally operating in Etowah County. Baptist has stated that it intends to emphasize services for its own patients and, in further support of its application's approval, noted that the State Health Plan indicates that the county is "underserved" even though both active providers have been in operation for many years;

(f) Some two hundred twenty six (226) patients were expected to receive seven thousand six hundred sixty (7,660) visits in 1992 and some two hundred twenty eight (228) patients were expected to receive seven thousand eight hundred twenty seven (7,827) visits in 1993;

(g) Baptist anticipates the following breakdown on payments for professional services: 7.6% of gross revenue will be self-pay; 53.5% will be Medicare; 4.4% will be Medicaid; 17.5% will be Blue Cross/Blue Shield of Alabama and 17.0% will be other insurance and

(h) SHPA Planning Policy 2 defines an "active provider" as an agency which holds a CON to serve the county and provides services to a minimum of 60 patients annually. There are two active and two inactive providers in Etowah County. SHPA Planning Policy 3 indicates that only statistical data generated by "active providers" will be used in a needs assessment in a particular health service area. SHPA Planning Policy 4 states that "any county below 3,000 visits and 90 persons served per 1,000 population 65 and older may be considered for an additional agency." Etowah County, by virtue of its 2,664 visits and 74.0 persons served per 1,000 population 65 and older is properly classified by SHPA as an "underserved" health service area.

2. Baptist has stated that it intends to provide, as mandated by SHPA Planning Policy 4, skilled nursing services; personal care; physical therapy; speech therapy; occupational therapy; medical social services and medical supplies. Additionally, Baptist Hospital will also provide respiratory therapy, enterstomal therapy and nutritional therapy on an "as needed" basis. (Baptist Record at p. 30).

3. Baptist currently operates a private-duty nursing service and, in the past, it has provided home health services on a contract basis for the Etowah County Health Department. An affiliated organization of Baptist Hos-

pital has provided speech therapy for both the county health department and another area hospital. All of the needed technical and clerical staffs, as well as administrative systems, are currently in place. These circumstances will enable Baptist to commence its home health operations with absolutely no new capital costs. (Baptist Record at p. 30).

4. A hospital-based home health agency, as contrasted with a freestanding service, offers the significant advantage of greater continuity of patient care. The planning of future home health care can often begin even before the hospital discharge occurs and in conjunction with the hospital care being received. Information and coordination between acute care nurses and physicians, and home health personnel, is much simplified when all are associated with the same organization. Indeed, the "continuity of care" issue is one that has been frequently raised by the Statewide Health Coordinating Council [See: Section 21-22-260(2) of the *Code of Alabama 1975*] and other health care organizations in Alabama. The Court finds from the evidence that such continuity of patient care is, for the most part, simply impossible for "outside" or freestanding agencies to maintain. (Baptist Record at p. 26).

5. Because there are only two "active" home health providers approved by SHPA for operation in Etowah County, there are not adequate specialty services in the area of home health. Such services should include speech therapy and occupational therapy. Baptist Health Services, the parent of Baptist Hospital, offers the only speech therapy services in Etowah County outside of the public school system. In addition, Baptist offers the only occupational therapy services in Etowah County. Therefore, approval of the Baptist CON application should greatly increase the accessibility and availability of such specialty services. The evidence demonstrates, based on a review of the diagnoses associated with the patients referred for home health services by Baptist Hospital, that highly

specialized services are needed for these patients and that Baptist will be equipped to provide such services. (Baptist Record at p. 25).

6. The vast majority of Baptist Hospital patients requiring home health services are Etowah County residents. All of these patients are presently being referred to outside agencies. While Baptist discharge planners and other hospital personnel work as closely as possible with the outside agencies, such arrangements can never be as effective—insofar as continuity of patient care is concerned —as working with an affiliated home health agency. Such care can only be maximized when the acute care provider is also the home health care provider. (The same is true when the home health patient requires admission, or readmission, to the acute care setting). (Baptist Record at p. 24).

7. Baptist Hospital presently operates a private-duty nursing agency which provides a much needed service to the community. The record shows that it is extremely difficult to continue to provide such a service because of financial constraints caused by the absence of Medicare reimbursement for this type of care. A Medicare-certified home health agency which would be part of the Baptist family of services, however, would be eligible for reimbursement. Such reimbursement could greatly assist in offsetting the financial deficit under which Baptist has provided certain services and it would insure that the private-duty nursing service can remain available and viable. Clearly, if Baptist were forced to cease offering private-duty nursing, there would be less competition in Etowah County for such service and the net effect would ultimately be an increase in costs for the residents of the health service area. (Baptist Record at p. 24). The Court notes the substantial contributions of Baptist Hospital to the community at large, and that the institution of this home health service at the institution will assist in reducing average lengths of stay in the acute care beds

of the hospital, ultimately resulting in reductions in costs within the overall health care delivery system. The control of unnecessary health care costs is one of the primary objectives of the health planning regulatory systems in Alabama.

8. Baptist has recognized experience in the delivery of home health services. Until relatively recently, Baptist was involved in the provision of a wide range of home health services to patients through a contract with the Etowah County Health Department. The contract was not renewed, at the option of Baptist, simply because of the inadequate payment system for such services. Baptist is known for its ability to deliver services, however, in this particular area of health care and the operation of its hospital-based home health service will not be "new" to Baptist in the sense that the hospital has provided similar care in previous years. (Baptist Record at p. 22).

9. The Court finds that the needs identified by Baptist coincide with the needs shown by the Alabama State Health Plan. The Plan indicates that home health services are most often utilized by persons 65 year of age and older. Baptist has a high percentage of patients this age. Over 53% of patients at Baptist Hospital are Medicare patients, with a median age of home referral typically being approximately 78 years. The average age of a referral is 73.5 years. (Baptist Record at p. 22). Approximately 90% of Baptist Hospital's home health referrals are patients above the age of 60; some 71% are above the age of 70. (Baptist Record at p. 21). There is no question about the existence of a large population of elderly persons who are in need of the services proposed to be offered or provided by Baptist under its home health agency proposal.

10. According to data from the State Health Plan utilized by Baptist at the time of its filing of its CON application, Alabama was experiencing a level of 3,241

home health visits per 1,000 population 65 years of age and older. There were 84.1 persons served per 1,000 population 65 and older. The State Health Plan's applicable section on home health states: "Since the vast majority of people receiving home health services are 65 years and older, this age group should be a consideration. Therefore, actual visits and persons served per 1,000 population 65 and older are the major consideration in identifying underserved areas. Counties falling below acceptable levels in both categories, for purposes of this [State Health] Plan, are considered underserved. These acceptable levels are 3,000 visits and 80 persons served per 1,000 population 65 and older, just below the state averages." The applicable State Health Plan shows that Etowah County had 2,664 visits and 74.0 persons served per 1,000 population 65 years of age and older. *These levels are well below the levels stated in the State Health Plan and indicate the need for the additional home health services proposed to be offered by Baptist under its CON application.* (Baptist Record at p. 19).

11. The evidence before the Court makes clear the fact that Baptist and its affiliated organizations and entities have a long history of providing high quality medical services in the Etowah County area. The application for the provision of home health is simply another effort on the part of Baptist to fill a gap in the health care continuum, and Baptist proposes to do so in a cost effective manner. For example, there are no approved occupational therapy home health services in Etowah County; Baptist Hospital, however, has an occupational therapist already on staff who is prepared to provide services when this CON is approved. Baptist is the largest hospital in Etowah County, both in terms of services and in terms of volume. Baptist is clearly capable of providing the resources and staff necessary for the provision of a high quality home health service. The record even demonstrates, according to the State Health

Plan statistics, that 57.6% of the Etowah County home health patients have been referred for services from Baptist Hospital. Baptist contends that because of the need for continuity of care; because of the need for the provision of high quality home health services; because approving Baptist would serve to best and most effectively utilize existing health care resources and because Baptist has a proven record of capability in the provision of the types of services it is here proposing, that it is the most appropriate applicant for SHPA approval under the relevant facts and circumstances. (Baptist Record at p. 18). The Court agrees with such contention.

12. Because of the fact that Baptist plans to emphasize and focus upon the provision of services, primarily, to its own patients, there is expected to be little or no detrimental impact upon existing providers. Current utilization levels should remain essentially unchanged, especially in light of the fact that the State Health Plan shows Etowah County is "underserved" even though both active providers have been in the market for many years. The other hospital provider in Etowah County should see little impact on its referral base because there is such a polarization among patients in the service area. Said another way, it is expected that the other hospital provider will continue to experience about the same level of utilization with or without approval of the Baptist project. Cross utilization between Baptist and its competitor is very low. (Baptist Record at p. 17).

13. Baptist has longstanding referral, linkage and transfer agreements with other health care providers both inside and outside Etowah County. This network will enable Baptist to maximize the potential of its home health agency much earlier than is true for the traditional "start-up" home health agency. (Baptist Record at p. 16).

14. Baptist contends, and the record supports the fact, that the option of approving another, freestanding,

home health agency for this CON authority is not an acceptable alternative. Problems already existing in the home health care delivery system will be made worse by such an approval; moreover, approval of a freestanding provider is simply not the optimal solution.

A hospital-based home health agency provides a level of care, and a continuity of care, that cannot be equalled in a freestanding setting. Once a patient is referred to an outside agency, the hospital provider must wait for the freestanding agency to come into the hospital to coordinate the provision of care. This can often cause a delay in discharging the patient, adding to already high costs of inpatient care and treatment. On the other hand, an agency affiliated with the hospital can coordinate this provision of care almost immediately. Patient and family education, needed in the home care setting, starts sooner. Visits by the specialized home care personnel—explaining future treatment plans for the patient—can take place long before discharge. This not only saves time, but it puts the patient and the patient's family at ease with respect to the "unknown" elements of such a program.

Baptist contends, and the record supports the fact, that it is the appropriate candidate for CON approval because it is in a position to initiate services more quickly and more economically than any other applicant or potential applicant. Speech therapy is already being provided by a Baptist affiliated entity and the only occupational therapist in the county has been employed by the hospital. As noted, Baptist has an extensive referral network; the administrative and technical staffs are already in place through the Baptist private duty nursing service and the prior experience of Baptist in the home health field is well documented. Baptist will incur no capital costs in starting this program since it already has a well established presence in Etowah County, with more than ample administrative space available for the operations. Physicians and residents in Etowah County are already aware

of the quality of care provided by Baptist organizations in the area and they appear quite comfortable with the ability of Baptist to operate this program in a responsible, professional and cost-effective manner. In short, Baptist meets all of the relevant criteria for CON approval on this project. (Baptist Record at p. 15).

15. Baptist Hospital is a not-for-profit hospital with a long and established history of providing high levels of indigent care. It has pledged to continue providing free care, with respect to home health, when this application is approved. (Baptist Record at p. 13).

16. The provision of home health services through Baptist Hospital is expected to enhance continuity of care; help reduce the cost of health care in Etowah County and improve the hospital's long term economic viability. Baptist is the appropriate applicant for CON approval in that it has a large Medicare patient population and a high home health referral ratio (to hospital discharges). A hospital-based agency, especially one in which the services systems currently exist, warrants approval over a start-up, freestanding, agency. A new agency would be more costly to establish and would be expected, ultimately, to result in higher health care costs for Etowah County residents. (Baptist Record at p. 56).

17. The health care reimbursement program, though in a state of potential flux under the Clinton administration's current plans for reform, militates in favor of approval of the hospital-based program. Medicare's Prospective Payment System ("PPS") is responsible for most of the "cost shifting" which occurs in hospitals today. This system is based on reimbursing a hospital a pre-determined or established amount for certain diagnostic categories ("DRG's"), regardless of the hospital's charges or costs. The average Medicare patient experiences a length of stay of 9.15 days. Medicare determines that the hospital will be reimbursed at an average, pre-set,

rate of $5,751 against total charges of, for example, $10,585. This pre-set or "prospective" rate is usually all a hospital will be paid by Medicare for the average patient.

There are at least two factors which impact upon the hospital's cost in caring for a Medicare patient: (1) the intensity of the services provided that patient and the resulting cost base and (2) the number of days the patient must remain in the hospital. If, for example, a hospital's actual daily cost for caring for a patient is $900 per day, the hospital's resulting cost is $8,190 for an average stay of 9.1 days. Medicare will reimburse only 5,751.00, leaving the hospital with $2,349 in actual costs unpaid by Medicare. This amount will either be absorbed by the hospital or passed on to paying patients (either individually or through their insurance) by means of higher patient charges.

By "shifting" losses from Medicare and bad debt to other payors, hospitals are able to continue operating in a highly regulated environment. However, the evidence is that such shifts result in higher health insurance premiums and increased health care costs for consumers, business and industry. Due to the impact of cost shifting on the overall cost of health care services, it has become apparent that acceptable methods to reduce or eliminate the practice of "cost shifting" must be found. The CON review process is designed in such a fashion as to be a part of the solution.

Retail businesses have considerable latitude in establishing methods for reducing losses. Hospitals, however, do not have many choices in how they can reduce the levels of "product loss" costs, which routinely occur with contractual allowances and bad debt. Various methods, such as utilization reviews, pre-admission qualification and a vigorous collection department, can go toward reducing a hospital's exposure and such policies have, generally, been implemented to the maximum extent practicable by hospitals.

The major contributor to the need for hospital cost "shifting" is the Medicare reimbursement system itself; Medicare patients are not at fault. It is thought that as few as ten to twenty percent of all Medicare patients are responsible for as much as eighty percent of hospital losses from prospective reimbursement. These are Medicare patients whose admissions have resulted in a cost or length of stay "outlier" status. This means, in effect, that their cost, length of stay, or both, are greater than Medicare allowances under the PPS system of hospital reimbursement.

The evidence makes clear that the key to reducing such losses is found in implementing methods which insure greater Medicare reimbursement for these patients. One such method is to establish a Medicare-certified home health agency. Such an entity permits the hospital to obtain cost-based reimbursement for visits and, simultaneously, provides legitimate opportunities for allocating existing general and administrative expense and depreciation to the agency.

By obtaining greater reimbursement from its Medicare patients, and by obtaining a more effective distribution of operating expenses, a hospital is able to more effectively control costs, thereby reducing or slowing the need to "shift" costs to other payors. The approval of the Baptist home health proposal, the Court finds, will greatly assist Baptist in its reimbursement program, thereby benefitting all the persons of the health service area who are served by the provision of care at Baptist Hospital and its affiliated entities. (Baptist Record at pp. 53-56).

18. The Alabama Department of Public Health voiced no opposition to the approval of the Baptist home health application, even though home health services are provided through the county health department in Etowah County. Indeed, the State Health Officer stated: "The [Alabama Department of Public Health] has enjoyed a good working relationship with Baptist Memorial Hos-

pital. We will continue to work with [Baptist] in the future to ensure the best possible care for . . . patients." (Baptist Record at p. 58).

19. Section 22-21-260(2) of the *Code of Alabama 1975* provides that the Statewide Health Coordinating Council ("SHCC") is empowered to "advise the State Health Planning [Agency] on matters relating to health planning and resource development." In its capacity as "advisor" to the CON Review Board, the SHCC has adopted the following resolution:

> BE IT RESOLVED BY THE STATE HEALTH COORDINATING COUNCIL OF ALABAMA that it fully supports and endorses care coordination and cooperation between the Alabama Department of Public Health and entities applying for a home health Certificate of Need.
>
> BE IT FURTHER RESOLVED that it is the sense of the State Health Coordinating Council that in considering applications for Certificates of Need to operate home health agencies, the Certificate of Need Review Board and the State Health Planning and Development Agency should consider whether such entities have entered into a co-operative arrangement with the Department of Public Health as contemplated by the above agreement and, if such an arrangement has been entered into, that the arrangement should be considered as evidence in favor of the application because it shows evaluation and consistency of the proposed change in service with the facility's and the community's overall health plan, as provided by Ala. Code Section 22-21-264(4)(c). (Emphasis added).

By means of such resolution, the CON Review Board has been advised by the Alabama SHCC that it should accept as favorable evidence the cooperative efforts of Baptist Hospital of Gadsden, Inc., and the Alabama Department of Public Health. (Baptist Record at pp. 58-

59). The Court does so, noting that there is no evidence to the contrary to the record.

20. The SHPA Staff Report, prepared by the professional reviewers at the agency, notes that since the implementation of the "DRG" system of reimbursement went into effect, more and more patients are being discharged earlier and earlier from acute care hospital facilities. Coupling the earlier discharges with the anticipated growth of the population in the relevant health service area, the SHPA Staff Report further underscores the need for additional home health services in Etowah County. The report states: "Baptist Hospital needs the opportunity to develop a continuum of care for its patients. On page 13 of the application, Baptist Hospital makes the assumption that large hospitals with larger service areas would have more home health referrals than hospitals smaller in size. [Baptist] also points out that [it] compares favorably to some of the largest hospitals in Alabama regarding the number of referrals." (Baptist Record at p. 90). While it is not the province of the SHPA Staff Report to "recommend" approval or denial of any particular application before the CON Review Board for consideration, the report makes it clear that the Board was authorized in approving the Baptist proposal under an application of the law and regulations to the relevant facts.

21. Approximately fifty percent of Baptist' patients fall into the Medicare category. Because of the cost-based reimbursement for hospital home health agencies under Medicare, coupled with the fact that there will be no additional recruiting of personnel; no building or acquisition costs; no additional administrative or support services costs and an overall reduction in costs of overhead by spreading the expenses over additional revenue, Baptist contends the project will be quite cost effective. The evidence supports such a contention. (Hearing Transcript at pp. 4-5).

22. While eighty percent of the home health referrals in Etowah County come from Baptist Hospital, Baptist does not intend to limit its services solely to Baptist patients. Additionally, the record demonstrates that Baptist is the only provider in Etowah County which is equipped to provide all the services described in the State Health Plan as necessary for maximum home health benefits, including skilled nursing; personal care; physical therapy; medical-social services and medical supplies. Baptist is also capable of providing all the necessary dietary, therapeutic, respiratory and enterostomal therapies needed by the patients it intends to serve. (Hearing Transcript at pp. 5-6).

23. As previously noted, Baptist is already providing extensive private duty nursing services. The staff currently in place is prepared to enlarge the responsibilities to include home health services. Personnel in charge of this department at Baptist have testified to the importance of patient care and continuity of service that this application be approved." If the family and patient choose our service, we [will] begin early in admission to provide the discharge plans for them; we feel that this encourages them and the physician to get an early discharge into home health care. We can follow that home health care from admission in the hospital to the home; many times, if they are sick enough to have to return to the hospital, then we can follow them back into the hospital without breaking or interrupting the service. If you're able to do that, we feel that the patient is better served, the quality of care is better and we just feel that with the loving, caring attention that the nurses can provide, going into the hospital with them, the families feel more secure and they are more confident." (Hearing Transcript at pp. 6-7). At the public hearing before the CON Review Board, Susan Easterwood, Supervisor of the Private Duty Department at Baptist Hospital, testified regarding the current operation of private duty nursing and how important it is to Baptist, and its patients, that this service be

expanded and enlarged to include home health services. (Hearing Transcript at pp. 7-8).

24. The evidence of record indicates the strong commitment of the Baptist organization to the provision of care to the citizens of Etowah County, even if that care must be delivered free of charge. Scott Hardee, Vice President of Baptist Health Services, spoke to the Board members and testified that during the year preceding the hearing, Baptist "wrote off around ten million ($10,000,000.00) dollars [in] indigent care.

"I feel like . . . we have a goal or a mission in Etowah County to serve the people. We currently have two agencies that are active in Etowah County. At this particular time, some of the needs in our county are not being met. One of those agencies, as recently as this week, we understand, [was] beginning to pull back and not take the patients due to a lack of staffing. At Baptist, as has already been indicated to you, we have the staff, we have the capabilities of taking care of the patients. As indicated earlier, we've been there for quite a while. We just feel . . . that we can do a good job in taking care of the patients in Etowah County." (Hearing Transcript at pp. 9-10). Evidence of record suggests that Baptist has experienced difficulties, through its discharge planning office, in placing patients in home health agencies in Etowah County due to a lack of adequate staffing. (Hearing Transcript at pp. 11-12).

25. The home health agency proposal of Alacare envisions an initial capital outlay of approximately nine thousand ($9,000.00) dollars, compared with a zero (0) capital outlay for Baptist. (Hearing Transcript at p. 12).

26. The "Fair Hearing" Officer sought to justify his decision in this case by noting that the CON Review Board had "impiicitly found [in certain other CON cases] that the hospitals [seeking home health CON approvals], on the basis of charge data, were the lowest cost pro-

viders." (Baptist Record at p. 210). On the basis that the "charges" proposed by Baptist were somewhat higher than the "charges" proposed by Alacare—and, in essence, on that basis alone—he reversed the CON Review Board's decision in favor of Baptist. It is clear that the Fair Hearing Officer either did not understand, or that he purposefully ignored, the salient fact that an acute care hospital is paid only a "fixed" number of dollars for home health under the current federal reimbursement program. To that extent, then, the "charges" proposed by a hospital are somewhat irrelevant; it makes no difference that a hospital may "charge" $100 dollars for a service if the reimbursement for the service is capped at $50.

The record makes it quite clear that the CON Review Board is authorized to, and that it routinely does, consider many, many factors on home health applications other than, and certainly in addition to, "charge data." Charges are simply one of many different different criteria utilized in coming to a decision on which applicant, among competing applicants, is the most appropriate for CON approval.

In seeking approval for its CON application under Project No. AL-91090, Alacare emphasized its cost per visit data and compared it with statewide averages for the same or similar services. Yet the Court notes the following undisputed facts which support the approval of the Baptist Hospital application, *viz:*

(a) The proposal for the establishment of home health services by Baptist envisions no new capital costs on behalf of the Hospital;

(b) While SHPA's Planning Policy 7 favors the approval of home health applications proposed by or on behalf of "rural" hospital facilities, Etowah County is not classified as "rural" by the United States Health Care Financing Administration ("HCFA"). Therefore, the CON Review Board was required to act upon other planning policies and by an application of the normal review

criteria to the relevant facts, with no attendant presumption in favor of Baptist Hospital;

(c) Etowas County has been designated as an "underserved" area of the state insofar as home health services are concerned. Obviously, the Board concluded that Baptist Hospital was the more appropriate applicant to fill that need (rather than Alacare) because of such issues as continuity of care; the provision of health care services, free of charge, to indigent persons; the availability of needed hospital services for home health patients and the integrated continuum of patient care that a freestanding home health agency simply cannot provide;

(d) The CON Review Board is authorized, under its legislatively conferred review powers, to consider the fact that a public hospital-based home health agency is the only type of home health applicant which has the financial ability and incentive to render care to Medicaid and indigent populations. While freestanding home health agencies will lose money by providing such care, hospitals can significantly reduce their losses by providing home health care, at the earliest possible opportunity, instead of continuing expensive inpatient care beyond the time it is really indicated and

(e) Regional hospitals such as Baptist have many advantages over freestanding home health agencies. These include: (1) the ability to reduce hospital costs and thereby reach a greater number of underserved areas and patients; (2) access to substantial inpatient revenues, giving the hospital-based agency financial flexibility that is often lacking in a freestanding setting; (3) the strong employment of qualified health care professionals with a number of different skills, meaning that the health care made available to the patients is greatly enhanced over what is typically available in the freestanding setting; (4) the capability to become involved with IV therapy services, durable medical equipment, home respiratory care, home nutrition, pain management and other health

care fields related to support of the hospital's "core" business of inpatient and outpatient care and (5) the ability to strengthen the continuum of care for both the hospital and the home health patients because of the bridge which then exists between acute care and home care services;

It is clear to the Court that the administrative agency fact finders were very interested in review criteria beyond the "charge data" related to the cost per home health visit. While charges can (and should) obviously be considered, they are certainly not intended to be dispositive of the Board's decisions in cases such as this one. The Court, accordingly, cannot conclude that Alacare is entitled to prevail in this action simply (or even primarily) because of a comparison of "charge data" between the two applicants. Such a conclusion would constitute an "apples and oranges" type comparison.

III. CONCLUSIONS OF LAW

A. *Standard of Review*

This Court is reviewing a final decision of the State Health Planning Agency that comes to it from a "Fair Hearing Officer" rather than from the deliberations of the CON Review Board itself. See, e.g., Section 22-21-275(14) of the *Code of Alabama 1975*. Because of this fact, the Court must consider whether the Fair Hearing Officer exceeded his lawful authority, or abused his discretion, in coming to the decision he reached.

Under Section 410-1-8-.22 of the SHPA *Rules and Regulations (Rev. 1991)*, the primary purpose of the "Fair Hearing" procedure is clearly explained. The purpose is to determine whether the application meets the requirements of Section 22-21-266 of the *Code of Alabama 1975* (with respect to inpatient services or facilities) or, otherwise, whether the application "is inconsistent with the criteria and standards set out in these [SHPA] rules, and whether [the application's approval]

is consistent with the appropriate State [Health] Plan." The scope of the review by the Fair Hearing Officer is expressly limited to the following issues:

> (a) Whether the application meets the requirements of Section 22-21-266, *Code of Alabama*, 1975, with respect to inpatient facilities or services, if applicable, as well as whether the application is consistent with each of the applicable criteria and standards set forth in Chapter 6 of these Rules, and whether the application is consistent with the appropriate State [Health] Plan;
>
> (b) Whether the State Agency acted in an arbitrary or capricious manner, without a reasonable justification for the decision, or in the absence of fixed standards against which the application was measured, or whether the State Agency otherwise abused its discretion in deciding among competing applications;
>
> (c) Whether the State Agency materially failed to follow review procedures as set out in these Rules and whether the error was substantial in its effect. (Emphasis added).

Under that same regulatory provision, additional limitations are imposed upon the Fair Hearing Officers assigned to hear and decide CON cases. The following issues, by regulation, shall not be considered by the Fair Hearing Officer and shall be deemed "immaterial to the Fair Hearing" decision:

> (a) The correctness, adequacy or appropriateness of the criteria, standard or plans by which the application was measured; or
>
> (b) New evidence or argument, whether written or oral, which has not been considered by the Certificate of Need Review Board or Administrative Law Judge at any previous hearing, or

(c) The determination of whether the proposal is a "new institutional health service" subject to review by these Rules.

Under this limited standard of review, the Fair Hearing Officer is certainly not authorized to substitute his judgment for that of the nine-member CON Review Board and, in *ipse dixit* fashion, reverse and hold for naught the reasonable and supported determination of the initial hearing. If there is credible evidence in the administrative record supporting approval of the Baptist application, and if the CON Review Board is reasonably justified in having decided in favor of Baptist and against Alacare, the analysis is at an end. Clearly, there is not one iota of evidence pointing to abuse of discretion or that SHPA somehow materially failed to follow its review procedures. Accordingly, the decision of the Fair Hearing Officer was, itself, an abuse of discretion and beyond his authority.

Under decided Alabama case law, a decision of the CON Review Board must be affirmed by the Fair Hearing Officer upon review unless the decision was clearly erroneous or arbitrary and capricious. See, e.g.. Section 41-22-20(k) of the *Code of Alabama 1975; State Health Planning Agency v. Mobile Infirmary,* 533 So.2d 255, 257 (Ala.Civ.App. 1988); *State Health Planning Agency v. Rivendell of Alabama, Inc.,* 469 So.2d 613, 614 (Ala. Civ.App. 1985); *Humana Medical Corporation v. State Health Planning Agency,* 460 So.2d 1295, 1297 (Ala. Civ.App. 1984). A decision of the CON Review Board cannot be deemed arbitrary or capricious if the decision is "reasonably justified" or based upon "fixed standards". See, e.g., *Health Care Authority of the City of Huntsville v. SHPA,* 549 So.2d 973, 975 (Ala.Civ.App. 1989).

Alabama law is further clear on the fact that a decision of the CON Review Board must be taken as "prima facie just and reasonable and [a] court shall not substitute its judgment for that of the agency as to the weight of

the evidence on questions of fact." Section 41-22-20(k) of the *Code of Alabama 1975; Rivendell of Alabama, Inc, supra; Humana Medical Corporation, supra; Health Care Authority of the City of Huntsville, supra.* This rule applies even to those cases where the testimony is generalized and the evidence meager or conflicting. Even when reasonable minds might differ as to the correct result, a substitution of judgment is not permitted. *Health Care Authority of the City of Huntsville, supra,* at p. 975. The Court finds that this same standard applies to the Fair Hearing Officer.

Obviously, the Fair Hearing Officer was in no better position to evaluate the testimony and evidence than this Circuit Court. He did not hear live witnesses and have the benefit of cross examination; rather, he simply reviewed the transcript of the proceedings before the CON Review Board and reviewed exhibits and arguments. Accordingly, it becomes even more clear that the Fair Hearing Officer went far beyond the acceptable bounds of his role as a hearing examiner when he absolutely rejected the reasonable determination of the CON Review Board on these two projects. Also, this Court should bear in mind that while the Fair Hearing Officer's decision must initially be treated by the Court as "just and reasonable" on its face, an application of the law to the facts is what reveals whether that presumption is overcome and nullified by the circumstances.

The evidence which was before the nine-member CON Board makes clear the fact that the determination in favor of Baptist, and adverse to Alacare, was reasonably justified. Because that is the case, *ergo,* the original ruling of the Board cannot be deemed "arbitrary or capricious." It must be affirmed and the "Fair Hearing" Officer's decision reversed.

B. *The Alacare Standing Issue*

A threshold matter, of some significance, is that of the standing of Alacare (or, better said, the lack of such

standing) to attack the approval of the Baptist CON application. As pointed out previously herein, Alacare and Baptist entered into a Joint Stipulation which was filed with SHPA and which forms a part of the administrative record in this appeal. Under and by virtue of that stipulation, both parties agreed that they were withdrawing any and all further opposition to the other applicant's CON approval. The stipulation, according to the copy of the record furnished to undersigned counsel, was never withdrawn by either party.

Clearly, the parties were attempting to find a settlement which would have permitted the approval of both CON applications. Certain findings of fact were agreed to, along with conclusions of law, and the same were submitted to the hearing examiner for his consideration. However, upon his review of the relevant regulatory schemes, the hearing examiner declined to enter what would have been, in effect, a consent judgment. Rather, he rejected the proposal that both Baptist and Alacare could be approved for home health services, finding that the CON Review Board would not have such authority even if he made such a recommendation.

The Court notes that the only aspects of the Joint Stipulation which were "rejected" by the hearing examiner had to do with certain legal conclusions and findings. Neither the parties to the stipulation, nor the hearing examiner himself, took any actions to withdraw, cancel, nullify or amend the remaining portion of the Joint Stipulation. It remains on file in this action today. Among other provisions, the parties agreed to withdraw further opposition to each other's application's approval. Under the circumstances, this means that Alacare waived its rights to attack the approval of the Baptist application.

Because Alacare withdrew both its intervention and its opposition to the Baptist application, Alacare cannot legitimately claim to have been "adversely affected" by SHPA's approval of the Baptist CON application. Since

Alacare withdrew its intervention and its opposition, and since, further, Alacare was not an existing Etowah County home health provider at the time of the filing of the Joint Stipulation or later, it is a legal impossibility for Alacare to claim proper standing to challenge the Baptist approval. Under those facts and circumstances, Alacare should be treated as a legal stranger to the approval originally granted to Baptist.

Under the circumstances, the appropriate action for the Fair Hearing Officer to have taken would have been to dismiss the Fair Hearing request on his own motion. Alternatively, the Fair Hearing Officer could have dismissed the request, or entered judgment in favor of Baptist, on the basis that there was no jurisdiction for him to act since Alacare had withdrawn its intervention and opposition. Having done so, Alacare was no longer legally interested in the outcome of the case which Baptist had before the CON Review Board.

This Court, upon review of the Joint Stipulation, finds and holds that Alacare waived any and all further rights to attack or challenge the administrative action on the Baptist CON application. Since Alacare, by its own pleadings, was no longer an intervenor or an opponent with regard to the Baptist application, it was a stranger to it. Accordingly, following the filing of the stipulation, there was no longer any basis upon which Alacare could complain about the Baptist project. They should have been reviewed on their own respective merits, if at all, by SHPA. Alacare had a right to request an administrative "Fair Hearing," therefore, with regard to its own application's denial but not with respect to the Baptist application's approval. See, e.g., Section 22-21-275(14) of the *Code of Alabama 1975* (Fair Hearing review available to "the applicant" with regard to its project's denial).

While the Court finds credible evidence supporting the Baptist argument of lack of standing on the part of

Alacare, it is unwilling to wholly invalidate the action taken by the SHPA in *setting* a Fair Hearing review between the applicants. Moreover, the standing issue is rendered moot, insofar as Baptist is concerned, by this Court's finding that the Fair Hearing Officer's decision must be reversed and the original CONRB decision affirmed. Insofar as that determination is concerned, the Court now addresses the merits of the original CON Review Board action in this matter.

C. *Conclusions as to Original Board Action*

The original decision of the full CON Review Board—rather than the decision of the Fair Hearing Officer—is the determination which this Court is prepared to uphold as and for the correct decision of SHPA. The original SHPA decision is well reasoned and supported by the testimony and evidence. The "Fair Hearing" decision is poorly reasoned and unsupported by the testimony and evidence.

According to the Alabama State Health Plan in effect at the time of filing of the Baptist application, Etowah County was an "underserved" area of our State. Therefore, according to the State Health Plan and SHPA (by means of the Staff Report), the Baptist project was susceptible to being approved by the CON Review Board. See, e.g., Alabama State Health Plan, Section 410-2-4-.04 (8)(d)(4). Indeed, the Board's original ruling specifically found that the Baptist project was consistent with the State Health Plan and that Baptist had demonstrated a community need for additional home health services. The Board further reasonably found that Baptist was the more appropriate applicant, as contrasted with Alacare, the freestanding provider. The SHPA Staff Report noted no inconsistency of the Baptist project with the applicable provisions of the State Health Plan and, additionally, specifically found Etowah County to be underserved in terms of home health services.

The Court notes that Alacare acknowledged these findings of SHPA and even acknowledged that Baptist was an appropriate applicant for CON approval. Moreover, Alacare was apparently so convinced that Baptist would be approved by the SHPA for home health that Alacare encouraged the CON Review Board and the Fair Hearing Officer to approve both the Baptist application as well as the Alacare application. When the matter went to the Fair Hearing Officer for review, following action in Baptist' favor by the CON Review Board, the single issue was whether the Board had acted arbitrarily and capriciously in selecting Baptist as the more appropriate applicant.

Alacare's contention to the Fair Hearing Officer was that it was the "more appropriate applicant" *simply because certain of its projected charges were lower than those projected by Baptist.* It contended that because this was the case, and because Alacare was proposing to "expand" its services into Etowah County, it should be approved.

It is without dispute, however, that facility charges are simply one of many considerations before the CON Review Board when it decides between competing CON applicants. SHPA's own regulations provide that the determination is "to be established from the evidence as to the ability of the person, directly or indirectly, to render adequate service to the public." Section 410-1-6-.09 of the SHPA *Rules and Regulations (Rev. 1991).* Among other things, the regulation states that this analysis must include professional capability; management capability and adequate manpower. The record is replete with the information provided to the Board, by Baptist, regarding its ability to render this health service and why it is a more appropriate applicant to provide the service than Alacare.

The evidence demonstrates that system-wide health care savings will occur if the CON authority is issued to

Baptist rather than Alacare. Hospital-based home health care is a less costly alternative to emergency or institutional health care, such as a hospital or nursing home. Patients are placed in lower cost settings where they can be provided necessary services which, in many cases, can prevent the patient's needing to be readmitted to the hospital. Such cost savings are especially important with regard to the provision of indigent care, since facilities such as Baptist have a proven history of rendering such care. Freestanding agencies such as Alacare have no economic incentive to provide any degree of free care and most provide little, or no, such care in the community.

There is no question but that Baptist will continue providing for indigent patients. As noted earlier, in one year alone, Baptist wrote off approximately ten million ($10,000,000.00) in indigent care. As a not for profit hospital, Baptist has a mission to serve all the people of the Etowah County service area, regardless of their ability to pay. The record demonstrates that, at the time of the decision, there were only two active providers in the county and one of them had ceased taking patients. Baptist has stated that it intends to meet that need, especially with regard to the poor. The role Baptist will play in the provision of home health will be a significant one, based upon the evidence, because moving indigent patients from the high-cost setting of an acute care hospital to a hospital-based home health agency will reduce costs over the entire health care delivery system.

Baptist already has the staff and equipment necessary to provide a high quality program of home health care. There will be no additional recruitment of staff; no building or acquisition costs and no additional administrative and support services costs. As noted in the application itself, there will simply be no capital costs associated with the approval of this project. Conversely, Alacare projects something under ten thousand ($10,000.00) dollars in initial costs for the establishment of its service.

The Court finds and concludes that Baptist has the necessary experience to provide the service. Until recently, Baptist provided home health services to patients through a contrast with the Etowah County Health Department. Additionally, Baptist operates its own private duty nursing service, providing services quite similar to those of a home health agency. Because of the private duty nursing already being offered in or through the Baptist system, all of the administrative systems, referral networks and staff requirements needed for home health are in place. All the necessary technical staff (such as nursing, speech pathology and physical and occupational therapy) are already employed by Baptist or by Baptist affiliated entities or organizations.

The Court notes, however, that Baptist may not be in a position to continue the provision of these services, due to financial constraints and considerations, as there is no Medicare reimbursement for many of its present services. Baptist expects it will be able to continue the services, however, if it is awarded CON authority for home health. Because the Baptist-based home health agency would help offset the financial impact of the private duty nursing service costs, it is reasonable to conclude that such service could continue with the approval of the home health application.

Baptist and its affiliated organizations have a long and well established history of providing only the highest quality medical services to the people of the service area. Physicians and residents of the Etowah County area are well aware of the quality of care provided by Baptist and they are confident in the abilities of the organization to render new and enhanced services. Baptist has a long-established referral, linkage and transfer system already in place with other health care providers. Such providers are located both within and without Etowah County proper.

In view of the fact that Baptist already has the staff and equipment required to provide home health services,

the necessary experience to provide or render the care and a long history of providing high quality medical attention to residents of the service area, and in further view of the fact that Baptist presently provides private duty nursing services similar to home health care, the granting of CON authority to Baptist is tantamount to an expansion of existing services rather than what is traditionally thought of as the establishment of a new institutional health service. Therefore, if priority consideration is to be given to any applicant, such consideration would be more appropriately given to Baptist rather than Alacare. Baptist has a presence and a history of service in Etowah County; Alacare does not. This Court finds this fact to be significant.

The evidence further supports the contention that a hospital-based home health agency will provide patients with greater continuity of care. Baptist has explained this, in its CON application, as follows: "The planning of future home health care can often begin before hospital discharge in conjunction with present hospital care being received. Information and coordination between acute care nurses and physicians with home health personnel is much simplified when all are associated with the same organization." Baptist contends, and the evidence supports, that a hospital-based agency can provide a level of continuity of care that hospital patients need. When a patient is referred to an "outside" agency, the hospital may have to wait for the agency to come to the hospital to coordinate the provision of services and transfer. This often results in delays in discharging the patient, which, in turn, adds unnecessary costs to the delivery of the care. A hospital-based home health agency, by contrast, can conduct the coordination almost simultaneously. Patient and family education, often needed in home health care settings, may start even prior to discharge. Therefore, Baptist expects to be in a position to begin providing home health care much more efficiently, and at substantially less cost, than Alacare. This is especially

important since some eighty (80%) per cent of the home health referrals from Etowah County come from Baptist Hospital and Baptist has experienced serious difficulties in placing patients with the existing home health agency providers.

Continuity of care is more easily, and more effectively, facilitated by a hospital-based home health agency than a freestanding agency. This is particularly true in those instances where the patient requires readmission to the hospital. This issue was addressed by Susan Easterwood, Supervisor of the Baptist Private Duty Nursing Department, at the public hearing, *viz:*

> If the family and patient choose our service, we begin early in admission to provide the discharge plans for them; and we feel that this encourages them and the physician to get an early discharge into home health care. We can follow that home health care from admission in the hospital to the home; many times, if they are sick enough to have to return to the hospital, then we can follow them back into the hospital without breaking or interrupting the service. If you're able to do that, we feel that the patient is better served, the quality of care is better, and we just feel that the loving, caring, attention that the nurses can provide going into the hospital with them, the families feel more secure and they are more confident.

Baptist is the only provider in the Etowah County service area that can provide all the home health services described in the State Health Plan. These include nursing care; personal care; physical therapy; medical social work and medical supplies. In addition, Baptist can provide dietary, therapeutic, respiratory and enterstomal therapies. Therefore, increased accessibility, continuity of care and quality of care will be insured by the approval of the Baptist, rather than the Alacare, application.

Baptist offers the only speech therapy services in Etowah County, outside the public school system, and the only occupational therapy services in the county. Therefore, home health CON authority in favor of Baptist will mean an increase in accessibility and availability of these specialty services which are not provided by the other home health agencies. Baptist has documented, and the evidence demonstrates, the high degree of need for these specialized services, and the Court has taken the same into account.

Home health services are most often utilized by individuals who are age sixty-five (65) or older. The SHPA data indicates that, for its size and utilization, Baptist has an unusually large number of patients in this age category who require home health care after discharge. Over fifty three (53%) percent of the patients at Baptist Hospital are Medicare patients. The median age of a home referral from Baptist was seventy eight (78) years in 1990. These patients have multiple health problems and are very much in need of specialized services.

In considering whether or not the CON Review Board was reasonably justified in making its decision in favor of Baptist and against Alacare, this Court has carefully considered the following review criteria of the SHPA and the applicability of each criterion to the Baptist application, *viz:*

> (1) Consistency with State Health Plan. The proposed service must, to the extent applicable, be consistent with the relevant provisions of the Alabama State Health Plan in effect when the application is received by SHPA. The SHPA Staff Report, along with the undisputed evidence of record, shows that the Baptist application was clearly consistent. Section 410-1-6-.02 of the SHPA *Rules and Regulations (Rev. 1991).*

(2) Long-range Development Plan of Applicant. SHPA requires that the proposal under consideration bear a reasonable relationship to the long-term development plans of the applicant. This criterion has been obviously met by Baptist, especially as the same relates to the mission of Baptist, and its related entities, to provide quality health care to the indigent persons who reside in the Etowah County health service area. Section 410-1-6-.03 of the SHPA *Rules and Regulations (Rev. 1991).*

(3)Availability of Alternatives. SHPA is required to consider whether there are less costly, more efficient, or more appropriate alternatives to the proposed facility or service to be offered or expanded. SHPA is authorized to give priority consideration to "those alternatives that are [already] in existence" at the time of the application's filing. It is clear from the record that Baptist, with its already-existing network of physicians and referral systems, is an existing "alternative" to the establishment of a free-standing home health agency. The existing private duty nursing department at Baptist is quite similar to a home health agency operation and it will require virtually no changes in the structure of that department to begin providing home health in Etowah County. Section 410-1-6-.04 of the SHPA *Rules and Regulations (Rev. 1991).*

(4) Need for the Project. The CON Review Board must determine if there is a substantially unmet public need for the proposal under review. In this case, neither Baptist nor Alacare disputed the fact that there is an unmet need for additional home health services in Etowah County; there has simply been a dispute as to which entity was best able to provide the service. Additionally, the State Health Plan itself shows a need for home health care in Etowah County and that the health service area is

"underserved" as that term is defined by SHPA. Section 410-1-6-.05 of the SHPA *Rules and Regulations (Rev. 1991).*

In particular, SHPA regulations require that the CON Review Board give consideration to the following areas of inquiry, each of which Baptist more than meets for purposes of CON approval:

(a) Financial feasibility of the proposed change in service of the facility;

(b) Specific data supporting the demonstration of need for the proposed change in facility or service shall be reasonable, relevant and appropriate;

(c) Evidence of evaluation and consistency of the proposed change in facility or service with the facility's and the community's overall health needs and health-related plans;

(d) Evidence of consistency of the proposal with the need to meet nonpatient care objectives of the facility such as teaching and research;

(e) Evidence of review of the proposed facility, service or capital expenditure when appropriate and requested by other state agencies;

(f) Evidence of the locational appropriateness of the proposed facility or service such as transportation accessibility, manpower availability, local zoning, environmental health, etc.;

(g) Reasonable potential of the facility to meet licensure standards and

(h) Reasonable consideration shall be given to medical facilities involved in medical education.

(5) Current and Projected Utilization in the Area. SHPA considers the current and projected utilization of similar facilities or services within the service area in determining the need for additional facilities or services. In this particular case, the evidence is clear that there is a need for more home health service in the Etowah County area and that existing providers are simply not meeting the needs of the residents of the service area. The approval of the Baptist application will go toward eliminating that unmet need. Section 410-1-6-.06 of the SHPA *Rules and Regulations (Rev. 1991).*

(6) Access to the Facility or Service. The regulations require that the Board consider the contribution of the proposed service or facility toward meeting the health related needs of traditionally "medically underserved" groups (for example, low income persons, racial and ethnic minorities, women and handicapped persons). The purpose of such review is to ensure that the medically underserved will receive equal access to care, that the project will be accessible to the whole community and that the community needs the proposed facility or service. In making such determination, the Board considers a number of criteria, all of which were resolved favorably to Baptist by the members, *viz:*

(a) The extent to which the medically underserved currently use the applicant's services in comparison to the percentage of the population in the applicant's service areas which is medically underserved, and are expected to use the proposed services;

(b) The applicant's performance in meeting its obligation, if any, under any applicable federal regulations requiring provision of uncompensated care, community service or

access by minorities or handicapped to programs receiving federal financial assistance;

(c) The extent to which the unmet needs of Medicare, Medicaid and medically indigent patients are proposed to be served by the applicant and

(d) The extent to which the application offers a range of means by which a person will have access to the proposed services.

Section 410-1-6-.07 of the SHPA *Rules and Regulations (Rev. 1991).*

(7) Relationship to Existing Health Care System. The relationship of the proposed new service to the health care system of the service area must be considered by the CON Review Board. The proposed service should be complementary to the existing health care delivery system. Clearly, the home health proposal of Baptist meets this criterion for approval. Section 410-1-6-.08 of the SHPA *Rules and Regulations (Rev. 1991).*

(8) Past Performance of the Applicant. The Board also considers, by its own procedures, the quality of care provided by the applicant in the past. This standard is amply met by Baptist, which has a history of providing only the finest health services in the area. Section 410-1-6-.17 of the SHPA *Rules and Regulations (Rev. 1991).*

(9) Compliance with Licensure Rules and Regulations. The applicant must demonstrate an ability to meet all applicable requirements of the Division of Licensure and Certification of the Alabama Department of Public Health. Baptist, of course, meets this mandate because it is subjected to annual inspections and licensure reviews by the Department

of Public Health. Section 410-1-6-.16 of the SHPA *Rules and Regulations (Rev. 1991).*

(10 Appropriate Applicant. When deciding between competing applicants for CON authority, the Board must determine which applicant is the most appropriate for approval. Such determination is to be made from a review of the evidence as to ability of the person, directly or indirectly, to render adequate service to the public, including affirmative evidence as to the following:

(a) Professional capability of the facility proposing the capital expenditure (if any);

(b) Management capability of the facility providing the capital expenditure;

(c) Adequate manpower, including health personnel and management personnel, enabling the facility to offer the proposed health service;

(d) Evidence of the existence of the applicant's long-range planning program and an ongoing planning process;

(e) Evidence of existing and on-going monitoring of utilization and the fulfilling of unmet or undermet health needs in the case of expansion and

(f) Evidence of communication with all planning, regulatory, utility agencies and organizations that influence the facility's destiny.

Section 410-1-6-.09 of the SHPA *Rules and Regulations (Rev. 1991).*

The evidence certainly supports the determination of the CON Review Board that—as between Bap-

tist and Alacare—Baptist was the more appropriate applicant for home health CON authority.

While Section 41-22-20(k) of the *Code of Alabama 1975* provides that a final decision by SHPA (as, here, the decision by the Fair Hearing Officer) is to be taken as "prima facie" just and reasonable, it is also clear that the reviewing court can "reverse or modify the decision . . . if [it is] clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Section 41-22-20(k)(6) of the *Code of Alabama 1975*. See also: *Ex parte Shelby Medical Center, Inc.*, 564 So.2d 63 (Ala. 1990).

On review by the Fair Hearing Officer, the original decision of the nine-member CON Review Board was reversed on the "finding" that the decision in favor of Baptist had been "arbitrary or capricious." Yet such a finding is not only not supported in the record, but it is not supported by existing case law. In *Sexton v. Tuscaloosa County Civil Service Board*, 426 So.2d 432 (Ala. Civ.App. 1983), the Court of Civil Appeals of Alabama stated: "A decision is not arbitrary where there is a *reasonable justification* for the decision or where the determination is founded upon adequate principles or *fixed standards.*" *Sexton*, 426 So.2d at 435 (emphasis in original).

In this case, there have always been "fixed standards" upon which the decision was grounded. These fixed standards are found in Section 22-21-264 of the *Code of Alabama 1975* and the agency regulations. The statute, and accompanying regulations, provide the findings prerequisite to the issuance of a certificate of need for home health services. There is evidence in the record indicating a clear and unmet *need* for additional home health services in the Etowah County health service area. There is ample evidence showing that Baptist is prepared, and has the necessary capabilities, to meet that need. There-

fore, there was reasonable justification for SHPA's approval of Baptist and its dnial of Alacare. The decision, therefore, was not arbitrary or capricious as a matter of law.

D. *No Approval for both Applicants*

Alacare argued in its Request for Reconsideration and even bcfore the Fair Hearing Officer that both the Alacare and the Baptist applications could be approved by the CON Review Board. Alacare argued that the need in Etowah County supported two additional agencies, and in its Request for Reconsideration stated: "* * * Alacare respectfully urges this Board to grant our Request for Reconsideration and to approve both application[s] based upon the record as a whole and because of the ongoing underservice in Etowah County."

The record shows, of course, that the Board denied the Request for Reconsideration. In fact, the CON Review Board has never approved the applications of two applicants for the same *urban* county at the same hearing. This is because, under SHPA's "Planning Policy 5," the Board is prohibited from approving an additional provider for home health services in any county in which another CON has been granted during the immediately preceding twelve (12) month period. That policy states: "Once a provider entity is approved for a county, that entity will be included as an active provider in that county for at least 12 months or through one complete cycle of SHPA's annual reporting period, whichever is greater. *No additional providers shall be approved during this time period except when an existing provider ceases services in that county.*" (Emphasis added). Alacare itself, in written statements filed with the SHPA, has acknowledged that Planning Policy 5 would apply to circumstances such as those found in this case. (Baptist Record at p. 173). In other cases cited by Baptist in the record below, SHPA's CON Review Board has made

it very clear that Planning Policy 5 prohibits the approval of two CON applications for the same county in the same hearing unless one of the applications is approved under some "other [index] of need" (such as SHPA Planning Policy 7, relating to priority consideration being given to rural hospitals).

Since Etowah County is not classified by SHPA as a "rural" county, the precedence of Planning Policy 7 never comes into play in this matter. Therefore, Planning Policy 5 dictates that only one of the two applicants could be approved by the SHPA Board. Once again, the decision of the Board was reasonably justified by the facts and by an appropriate application of the law to the relevant facts. Such a determination cannot, as a matter of law, be "arbitrary or capricious." Therefore, the Fair Hearing Officer's determination is due to be reversed and held for naught.

V. CONCLUSION

The result Baptist received at the hands of the hearing examiner was unsupported by the facts and by a proper application of the law to those facts. There is no substantial legal basis for the hearing officer's conclusion that the CON Review Board's action was "arbitrary" or "capricious," especially in light of the testimony and evidence supporting approval of the Baptist application.

Even in cases where the evidence has been meager or the testimony "generalized," the courts of Alabama have held that it is not the province of the reviewing entity to substitute its judgment or pass upon the wisdom of the decision of the administrative agency charged by the legislature with the responsibility of making such decisions. See, e.g., *Hughes v. Jefferson County Board of Education*, 370 So.2d 1034 (Ala.Civ.App. 1979); *State Health Planning Agency v. Rivendell of Alabama, Inc.*, 469 So.2d 613 (Ala.Civ.App. 1985).

In his specially concurring opinion in the *Rivendell* case, Judge Holmes noted that even though the SHPA's

CON Review Board had not approved the Rivendell project for a new psychiatric hospital facility, "there was ample evidence that [the hospital] would be highly beneficial to the citizens of this State." Yet and still, Judge Holmes wrote: "Put another way, in my view, there was ample evidence that would have supported SHPA's issuance of a Certificate of Need [to Rivendell]. However, in view of the evidence, the denial of the Certificate of Need cannot be said to be arbitrary or capricious."

In this case, there was more than ample evidence to support the CON Review Board's original approval of the Baptist application. Therefore, the approval of Baptist, and the concurrent denial of Alacare, cannot be said to have been "arbitrary" or "capricious."

The decision of the Fair Hearing Officer, accordingly, is found by this Court to be erroneous as a matter of law. Because the decision rendered in those proceedings must, therefore, be nullified and held for naught, the Court must determine whether the original decision of the CON Review Board was correct and proper as a matter of law. It was.

Based upon a review of the evidence herein, and the respective arguments and authorities supplied to the Court by the counsel to the parties, this Court finds and concludes that the original approval of the Baptist CON application, SHPA Project No. AL-91048, is due to be affirmed and that Alacare is to take nothing under or from its CON application with the state agency.

In accordance with such conclusions, this Court finds that the plaintiff is entitled to receive declaratory and injunctive relief under its Petition. Therefore, a Judgment and Injunction will be issued in conformity with this Memorandum Opinion. The injunction which this Court grants plaintiff directs the state defendants to issue, within sixty (60) days, Certificate of Need authority or approval to Baptist Hospital of Gadsden, Inc., as more fully explained hereinabove.

DONE: This the 10th day of June, 1993.

/s/ William H. Rhea, III
WILLIAM H. RHEA, III
Circuit Judge

Justice D. Smyth, III, Montgomery [For Baptist Hospital]
Margaret McNeill, Montgomery [For SHPA]
Nanette Sims, Birmingham [For Alacare]

APPENDIX C

ALABAMA
COURT OF CIVIL APPEALS

No. AV92-673

ALACARE HOME HEALTH SERVICES, INC.

v.

BAPTIST HOSPITAL OF GADSDEN, INC.

Appeal from Etowah Circuit Court

No. CV-92-695

Hon. William H. Rhea, III, Circuit Judge

Application for Rehearing filed May 27, 1994.

Application for Rehearing overruled June 17, 1994.

/s/ Thigpen
Judge

Richardson, P.J., and Yates, J., concur.

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

February 3, 1995

1931343

Ex parte Alacare Home Health Services, Inc. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Alacare Home Health Services, Inc. v. Baptist Hospital of Gadsden, Inc.) (AV92000673) (Etowah: CV-92-695)

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

COOK, J.—Maddox, Almon, Shores, Houston and Ingram, JJ., concur.

APPENDIX E

STATE OF ALABAMA
STATE HEALTH PLANNING AND DEVELOPMENT AGENCY
MONTGOMERY, ALABAMA

FAIR HEARING IN THE MATTER OF:

Project No. AL-91090

ALACARE HOME HEALTH SERVICES, INC.
(ETOWAH COUNTY)

Project No. AL-91048

BAPTIST MEMORIAL HOSPITAL
(ETOWAH COUNTY)

FINAL ORDER

This cause came before the Hearing Officer upon the request of Alacare Home Health Services, Inc. ("Alacare") for a Fair Hearing concerning the denial of its CON Application in Project No. AL-91090 and the approval of the application in Project No. AL-91048 of Baptist Memorial Hospital ("BMH") by the CON Review Board pursuant to vote of December 3, 1991. Following issuance of a hearing notice, the parties stipulated on March 3, 1992 that the case would be decided by the Hearing Officer based on the record and written pleadings. On March 20, 1992, both BMH and Alacare filed briefs in support of their positions. BMH and Alacare filed responsive briefs on March 27, 1992.[1] ABC

[1] BMH objected to consideration of a "Proposed Order" filed by Alacare on March 31, 1992. Due to the fact that the Proposed

Home Health of Alabama, Inc. ("ABC"), filed a responsive brief on March 27, 1992 which was considered by the Hearing Officer on an amicus curiae basis.

Following the consideration of such material and after review of the whole record, the Hearing Officer has determined that the following Findings of Fact and Conclusions of Law are supported by a preponderant weight of evidence and law and thereby substantiate the Order that follows.

I.

FINDINGS OF FACT

1. On March 22, 1991, BMH filed an application with the State Health Planning and Development Agency ("SHPDA") to establish a new home health agency ("agency") in Etowah County, Alabama. Said application was accepted, designated as AL-91048, and assigned to the Board for public hearing pursuant to SHPDA Rules.

2. On March 29, 1991, Alacare filed an application with SHPDA to expand an existing agency into Etowah County, Alabama. Said application was accepted, designated as AL-91094, and assigned to the Board for public hearing pursaunt to SHPDA Rules.

3. On March 29, 1991, ABC Home Health Services of Alabama, Inc. ("ABC") filed an application with SHPDA to establish a new agency in Etowah County, Alabama. Said application was accepted, designated as AL-91042 and assigned to the Board for public hearing pursuant to SHPDA Rules.

4. Pursuant to SHPDA Rules, the three projects were batched for comparative review.

Order merely restates arguments raised in prior filings, it has been included in the record. The Hearing Officer has not given consideration to any factual statements contained in said document to which BMH has not had an opportunity to respond.

5. Following the batching of the aforementioned applications, ABC requested that the cases be treated as "*contested cases*" pursuant to the Alabama Administrative Procedure Act, *Ala. Code* §§ 41-22-1, *et seq.* (1975) as amended (the "AAPA"). Accordingly, the Executive Director of SHPDA assigned said projects to a hearing officer for a contested case hearing. On or about November 18, 1991, ABC withdrew its request for contested case status, as well as its request for intervenor status in regard to Alacare's project. On or about November 26, 1991, ABC withdrew its application.

6. The applications of BMH and Alacare were heard by the CON Review Board on a comparative basis at a public hearing held on December 3, 1991. At this meeting, the Board voted to approve BMH's application in Project AL-91048 and to deny Alacare's application in Project AL-91090.

7. On or about December 23, 1991, Alacare filed a motion for reconsideration with respect to both the BMH and Alacare projects. At a public hearing held on January 14, 1992. the Board failed to establish a voting quorum and, therefore, Alacare's motion was deemed to have been denied. On January 17, 1992, Alacare requested a Fair Hearing with respect to both the BMH and Alacare projects.

8. Alacare contends that the decisions of the Board in regard to both projects were arbitrary and capricious, due to the fact that they were not reasonably justified or based upon fixed standards. In support of its contention, Alacare raises several specific issues including: (1) whether the financial data, proposed charges and operating projections of BMH were suspect, misleading, and without evidentiary foundation; (2) whether the Board failed to provide Alacare with a fair and impartial hearing due to its consideration of Alacare's participation in an unrelated lawsuit against the Board; (3) whether the Board failed to give Alacare priority consideration as an

existing provider; and (4) whether the Board's action in approving BMH's application over that of Alacare's was consistent with its prior decisions in light of the proposed charges and cost of the projects.

9. According to the State Health Plan ("SHP") in effect at the time the applications were filed, Etowah has two active providers. Under § 410-2-4-.04(8)(d)(4) of the SHP ("Planning Policy 4"), any county below 3,000 visits and 80 persons served per 1,000 population age 65 and older may be considered for an additional agency. According to the SHP, Etowah County experienced 2,664 visits and 74 persons served per 1,000 population, thereby qualifying for one additional agency under the regulation. Thus, the granting of an additional agency is consistent with the SHP.

10. In regard to Alacare's contention that the Board failed to give it priority consideration as an existing provider, SHPDA Rule 410-1-6-.06(1)(e)1 states:

> *Expansion of existing services may be viewed more favorably than the establishment of new services as a generally more cost effective alternative, however, the availability and accessibility of services must be considered.*

Thus, § 410-1-6-.06(1)(e)1 provides two considerations for the Board: (1) that expansion of existing services may be viewed more favorably; and (2) that availability and accessibility of services must also be considered.

11. BMH claims that the granting of its application would be *"tantamount"* to an expansion of existing services due to the fact that it previously provided home health services through a contract with the Etowah County Health Department and currently provides private duty nursing services. It claims that these operations, along with its general hospital activities, provide it with the experience and resources to provide home health services.

12. At the December 3, 1991 hearing, BMH also pointed to its commitment to provide health care to indigent patients and improve the accessibility of such services. BMH also cited the advantages of a close working relationship between those involved with the hospital and those providing the home health services. (Transcript of CON Board hearing, p. 5).

13. Due to the fact that these projects were not considered on a contested case basis, there is little in the record to substantiate the claims of either party as to the appropriateness of their applications. It is undisputed that Alacare is an *existing provider* for purposes of § 410-1-.06(1)(e)1. While BMH has experience in the type of services described in its application, it is not a certificated provider seeking to expand an existing service. There was some evidence, however, that BMH's project will improve accessibility of such services by ensuring the availability of less costly alternatives to in-patient care. Unfortunately, the transcript of the hearing and the written Order provide little indication of the weight given by the Board to these factors. The Hearing Officer finds that, given the context of the "*informal*" hearing process, the evidence was sufficient for the Board to reach a conclusion that the grant of BMH's application would improve the accessibility of services in the area. This is just one factor to be weighed by the Board, however, and in light of the remaining evidence is not sufficient to justify the selection of BMH as the most appropriate applicant.

14. SHPDA Rule 410-1-6-.04 and *Ala. Code* § 22-21-244 (1975) provide that the cost of providing health care services is an important factor to be considered by the Board. The Orders of the CON Board approving BMH's application, and denying that of Alacare's, specifically cite the projected charges of these projects as a basis for the Board's decision.

15. In its application, as reflected in the December 3, 1991 Order, Alacare proposed the following charges:

Skilled Nursing	$85.00
Physical Therapy	85.00
Speech Therapy	85.00
Occupational Therapy	85.00
Social Services	95.00
Home Health Aide	40.00

Alacare estimates that the capital costs associated with the project would to be limited to $9,000.00, consisting of office computer equipment. (Alacare, R. 106).

16. In its application, as reflected in the December 3, 1991 Order, BMH proposes the following charges:

Skilled Nursing	$91.65
Physical Therpay	82.74
Speech Therapy	94.77
Occupational Therapy	90.19
Social Services	124.63
Home Health Aide	52.98

17. As shown above, Alacare's proposed charges are clearly lower than those of BMH's, which distinguishes this case from three other comparative hearings involving Alacare which were heard immediately prior to the Etowah County vote. In each of the other cases, the Board issued Orders approving the application of a local hospital over that of Alacare's which contained an analysis of the proposed charges of the respective applications. In its orders, the Board implicitly found that the hospitals, on the basis of charge data, were the lowest cost providers. In the present case, the situation is reversed, with BMH providing proposed charges higher than the established and documented charges of Alacare. Although the written orders issued by the Board in regard to both projects cite the proposed charges of the respective applicants, they provide no explanation as to why the Board elected to choose the provider with the highest proposed

charges. In light of the record of the public hearing, and the language of the written orders in each of the other home health cases decided contemporaneously by the Board, there is no reasonable basis for this contradiction. Accordingly, the Fair Hearing Officer finds that the decisions of the Board in regard to both projects were arbitrary and capricious.

18. Alacare states that its proposed operation will have less of an effect on "*existing facilities or services*" than that of BMH, and that the Board violated its rights to a fair hearing by considering Alacare's participation in certain litigation involving the Board. Such allegations need not be addressed in light of the findings above. Nevertheless, the Fair Hearing officer hereby adopts the findings on these issues as set out in the Orders issued in regard to Cherokee County (Project Nos. AL-91080 and AL-91026), Limestone County, (Project Nos. AL-91094 and AL-91095), and DeKalb County (Project Nos. AL-91085 and AL-9027).

19. The Hearing Officer recognizes that the record before the Board is meager and that the parties were not given the opportunity to explore the underlying strengths and weaknesses of the opposing applications through any type formal hearing process. Such a process is not required, however, under Alabama law or SHPDA Rules, absent a timely request from a party of record. Nevertheless, a minimum of consistency in the consideration of home health applications is required under the law.

The conclusions of the Board in regard to the applications of BMH and Alacare were not justified by the record and testimony before the Board. Given the standard applied by the Board in prior cases and the failure of the Board to provide a basis for its deviation from such standards, the decisions of the Board in Projects AL-9028 and AL-91084 are due to be set aside.

II.

CONCLUSIONS OF LAW

1. This proceeding was lawfully conducted pursuant to *Ala. Code* § 22-21-275(14) (1975), as amended, and SHPDA Rules 410-1-8-.14-.18.

2. All parties were properly notified and have submitted briefs on the issues involved.

3. The Hearing Officer finds that the decisions of the Board to approve Project No. AL-91048 and to deny Project No. AL-91090 were inconsistent with fixed standards as applied by the Board in prior cases and was not justified by the evidence and testimony before the Board.

ORDER

Therefore, in accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED that the Order of the CON Board approving Project No. AL-91048 and the Order denying Project No. AL-91090 are hereby reversed. The application filed in Project No. AL-91048 is hereby denied and the application filed in Project No. AL-91090 is hereby granted.

DONE this 28th day of May, 1992.

/s/ Mark D. Wilkerson
MARK D. WILKERSON, ESQ.
Hearing Officer

cc: Mr. Derrell O. Fancher
Mr. James E. Sanders
Kym Reddoch, Esq.
Margaret McNeil, Esq.
Mr. John G. Beard
M. Ann Huckstep, Esq.
Eugene Watson, Esq.

APPENDIX F

RULING OF THE CERTIFICATE OF NEED REVIEW BOARD

AL-91026 Baptist Medical Center Cherokee Centre, Alabama

FACTS:

1. This is an application for certificate of need for the establishment of a home health agency to serve the residents of Cherokee County. There are no capital costs associated with this project. This application was batched and considered comparatively with AL-91080 Alacare Home Health Services, Inc. This application was not considered by the Board as originally scheduled on July 9, 1991 as ABC Home Health Agency, Inc. formally intervened and requested a contested case hearing by letter dated June 7, 1991. ABC Home Health of Alabama, Inc. withdrew the request for contested Case hearing, on November 26, 1991 and filed a notice of withdrawal of their application AL-91032.

2. There is no new construction associated with this project.

3. The proposed charges after the completion of this project will be $69.00 per visit for nursing, $78.00 for physical therapy, $78.00 for speech therapy, $70.00 for occupational therapy, $108.00 for social services and $45.00 for home health aide.

4. The proposed primary service area for this project is Cherokee County. The population projection for 1991 asre as follows

County	Estimated Population	Percentage 65 and Older	Population 65 and Older
Cherokee	21,799	14.8%	3,224

5. Page 95 of the State Health Plan indicates that Cherokee County has one active provider. The county is also indicated to be underserved. Page 97 of the Plan notes that there are three inactive providers serving Cherokee County. Planning policy number 2 on page 92 of the State Health Plan states that only agencies which hold a CON to serve the county and provide services to a minimum of 60 patients annually are considered "active". Planning policy number 3 on page 93 states that only statistical data generated by "active providers" will be used in needs assessment. Planning policy number 4 on page 93 of the State Health Plan provides that any county below 3,000 visits and 80 persons served per 1,000 population 65 and older may be considered for an additional agency. The chart on page 95 of the State Health Plan shows only 2,091 visits and 50.5 persons served per 1,000 population age 65 and older in Cherokee County. Planning policy number three on page 88 states that to insure availability accessibility and freedom of choice, two active providers per county shall be allowed without regard to needs methodology calculations. Individually or collectively, these two active providers should accept all third party payment sources, Medicaid and indigent patients.

6. The increase in Cherokee County's elderly population and the current prospective payment system producing pressure to cut length of stay has placed growing pressure on BMC Cherokee Hospital to discharge patients to less restrictive levels of care that are now inappropriate or unavailable.

7. On page 30 of the application, the applicant stated that this project will not adversely affect other home health care providers serving Cherokee County residents as evidenced by current factors within Cherokee County.

8. The applicant projects that 90 persons will receive 3081 visits in 1991 and 96 persons with 3287 visits in 1992.

9. The applicant projects that the source of revenue will be 92% for Medicare and 8% self pay in 1992.

Based on the above facts, and upon the provisions of Section 22-21-264, *Code of Alabama*, 1975 the Board finds the following:

a. that the application is consistent with the current State Health Plan;

b. that the project has demonstrated a community need; and,

c. that the applicant is the most appropriate applicant.

By vote of the Certificate of Need Review Board, for the reasons herein stated, Project AL-91026 is hereby approved.

/s/ F. Wallace Bromberg, Jr.
F. WALLACE BROMBERG, JR.
Acting Chairman
Certificate of Need Review Board

Done this 3rd day of December, 1991.

RULING OF THE CERTIFICATE OF NEED REVIEW BOARD

AL-91080 Alacare Home Health Services, Inc.
Birmingham, Alabama

FACTS:

1. This is an application for certificate of need for a home health agency to expand its existing service area to include Cherokee County. Capital costs associated with this project are $9,000. This application was batched and considered with AL-91026 Baptist Medical Center Cherokee. This application was not considered by the Board as originally scheduled on July 9, 1991 as ABC Home Health Agency, Inc. formally intervened and requested a contested case hearing by letter dated June 7, 1991. ABC Home Health of Alabama, Inc. withdrew the request for contested Case hearing, on November 26, 1991 and filed a notice of withdrawal of their application AL-91032.

2. The proposed charges after the completion of this project will be $85.00 per visit for nursing, $85.00 for physical therapy, $85.00 for speech therapy, $85.00 for occupational therapy, $95.00 for social services and $40.00 for home health aide. Medicare reimburses based on actual cost per visit. Medicaid reimburses $27.00 fo skilled nursing and aide visits. Blue Cross of Alabama pays for skilled nursing at $50.00 per visits.

3. Capital costs associated with this project are $9,000 for equipment.

Based on the above facts, and upon the provisions of Section 22-21-264, *Code of Alabama*, 1975 the Board finds the following:

a. that the applicant is not the most appropriate applicant.

By vote of the Certificate of Need Review Board, for the reasons herein stated, Project AL-91080 is hereby disapproved.

/s/ F. Wallace Bromberg, Jr.
F. WALLACE BROMBERG, JR.
Acting Chairman
Certificate of Need Review Board

Done this 3rd day of December, 1991.

RULING OF THE CERTIFICATE OF NEED REVIEW BOARD

AL-91095 Athens-Limestone Hospital
Athens, Alabama

FACTS:

1. This is a Certificate of Need application for the development and operation of a home health agency to provide services to the residents of Limestone County. There are no capital costs associated with the project. This application was batched and heard comparatively with AL-91094, Alacare Home Health Services, Inc. This application was not considered by the Board as originally scheduled on July 9, 1991 as AL-91043 ABC Home Health of Alabama, Inc. formally intervened and requested a contested case hearing. Subsequently, ABC Home Health of Alabama, Inc. withdrew their request for a contested case hearing and also withdrew application number AL-91043.

2. There is no new construction associated with this project.

3. The proposed primary service area for this project is Limestone County. The population projections for 1991 are as follows: Total population of Limestone county is 52,884 and 65 and older population is 6,849.

4. The proposed charge will be $69.00 per visit for nursing, $78.00 for physical therapy, $70.00 for speech therapy, $108.00 for social services and $45.00 for home health aide.

5. The applicant projected that the source of revenue will be 91% for Medicare, and 9% self-pay in 1992.

6. This project will have no adverse affect on the operations of active providers in Limestone County. The home health care market in Limestone County is

considerably underserved and can accommodate one additional provider.

7. The applicant projects that 200 patients will receive 6848 visits in 1991 and 215 patients will receive 7361 visits in 1992.

8. Planning Policy number 4 on page 93 of the State Health Plan states that any county below 3,000 visits and 80 persons served per 1000 population 65 and older may be considered for an additional agency. The chart on page 95 of the Plan indicates that only 800 visits and 49.5 persons were served per 1000 population age 65 and older in Limestone County.

   Page 95 of the State Health Plan indicates that there are two active providers serving Limestone County. The county is also depicted as underserved. There are also two inactive providers serving Limestone County. Planning Policy number 2 on page 92 states that only agencies which hold a CON to serve the county and provide services to a minimum of 60 patients annually are considered "active". Planning Policy number 3 on page 93 provides that only statistical data generated by "active" providers" will be used in needs assessment.

Based on the previously stated facts, and upon the provisions of Section 22-21-264, *Code of Alabama*, 1975 the Board finds the following:

a. that the application is consistent with the current State Health Plan;

b. that the project has demonstrated a community need; and,

c. that the applicant is not the most appropriate applicant.

By vote of the Certificate of Need Review Board, for the reasons herein stated, Project AL-91095 is hereby approved.

/s/ F. Wallace Bromberg, Jr.
F. WALLACE BROMBERG, JR.
Acting Chairman
Certificate of Need Review Board

Done this 3rd day of December, 1991.

RULING OF THE CERTIFICATE OF NEED REVIEW BOARD

AL-91090 Alacare Home Health Services, Inc. Birmingham, Alabama

FACTS:

1. This is an application for a Certificate of Need for the expansion of a service area of an existing home health agency to serve the residents of Etowah County. Capital costs associated with this project was $9,000 for equipment. This application was heard comparatively with AL-91048, Baptist Health of Gadsden, Inc. This application was not considered by the Board as originally scheduled on July 9, 1991 as AL-91042. ABC Home Health Agency, Inc. formally intervened and requested a contested case hearing. Subsequently, ABC Home Health of Alabama, Inc. withdrew their request for contested Case hearing and also withdrew application Number AL-91042.
2. The equipment will be funded from cash on hand.
3. The proposed charges after the completion of this project will be $85.00 per visit for nursing, $85.00 for physical therapy, $85.00 for speech therapy, $85.00 for occupational therapy, $95.00 for social services and $40.00 for home health aide. Medicare reimburses based on actual cost per visit. Medicaid reimburses $27.00 for skilled nursing and aide visits. Blue Cross of Alabama pays for skilled nursing at $50.00 per visit.
4. Alacare Home Health Services, Inc. is an Alabama corporation based in Jefferson County, Alabama. Alacare holds CONs to serve nine north central Alabama Counties and two northeast Alabama Counties.

Based on the previously stated facts and upon the provisions of Section 22-21-264, *Code of Alabama*, 1975 the Certificate of Need Review Board finds the following:

a. that the applicant is not the most appropriate applicant.

By vote of the Certificate of Need Review Board, for the reasons herein stated, Project AL-91090 is hereby disapproved.

/s/ F. Wallace Bromberg, Jr.
F. WALLACE BROMBERG, JR.
Acting Chairman
Certificate of Need Review Board

Done this 3rd day of December, 1991.

RULING OF THE CERTIFICATE OF NEED REVIEW BOARD

AL-9027 Baptist Medical Center DeKalb
Fort Payne, Alabama

FACTS:

1. This is an application for a certificate of need for the development and operation of a home health agency to serve the population of DeKalb County. There were no capital costs associated with this application. This application was batched and heard comparatively with AL-91084, Alacare Home Health Services, Inc. This application was not considered by the Board as originally scheduled on July 9, 1991, as AL-91034, ABC Home Health of Alabama, Inc. formally intervened and requested a contested case hearing. Subsequently, ABC Home Health of Alabama, Inc. withdrew their request for a contested case hearing and also withdrew application number AL-91034.

2. There is no construction cost associated with this project.

3. The proposed charges will be $69.00 per visit for nursing, $78.00 for physical therapy, $78.00 for speech therapy, $70.00 for occupational therapy, $108.00 for social services and $45.00 for home health aide.

4. The proposed primary service area for this project is DeKalb County. The population projection for 1991 is 60,823 and the population 65 and older is 8,699 or 14.3% of the total population.

5. DeKalb County is designated as rural and the physician shortage is acute; persons must travel longer distances to obtain health care; emergency health services are more deficient than in urban areas; and a comprehensive approach to health care delivery often is not present. This application promotes continuity of health care services in DeKalb County, the

economic viability of BMC DeKalb Hospital and will insure the availability of less costly alternatives to inpatient care.

6. This project should not adversely affect the other providers of home health care in DeKalb County as evidenced by the available market projected by other need method calculations.

7. The applicant projects that 393 patients will receive 13,456 visits in 1991 and 421 patients will receive 14,415 visits in 1992.

8. Page 95 of the State Health Plan indicates that DeKalb County is designated as rural by Health Care Financing Administration. DeKalb County is also underserved. There is only one active provider of home health services and one inactive provider in the County.

   Planning Policy number 2 on page 92 states that only agencies which hold a CON to serve the county and provide services to a minimum of 60 patients annually are considered "active". Planning Policy number 3 on page 93 states that only statistical data generated by "active providers" will be used in needs assessment.

   The SHOC recognizes the need for rural hospitals to emphasize the provision of non-acute care. Therefore, rural hospitals may receive priority consideration in the review process. Under this policy, only one additional applicant in each rural county may be approved. Only a general acute care hospital which operates its primary facility in a rural county may receive such priority consideration.

   Planning Policy number 4 on page 93 states that any county below 3,000 visits and 80 persons served per 1,000 population 65 and older may be considered for an additional agency. In DeKalb County only

1,201 visits and 35.8 persons were served per 1,000 population 65 and older.

Additionally, Planning Policy number 3 on page 88 provides that to insure availability, accessibility and freedom of choice, two active providers per county shall be allowed without regard to needs methodology calculations.

Based on the previously stated facts, and upon the provisions of Section 22-21-264, *Code of Alabama*, 1975, the Board finds the following:

a. that the application is consistent with the current State Health Plan;

b. that the project has demonstrated a community need; and

c. that the applicant is the most appropriate applicant.

By vote of the Certificate of Need Review Board for the reasons herein stated, Project Number AL-9027 is hereby approved.

/s/ F. Wallace Bromberg, Jr.
F. WALLACE BROMBERG, JR.
Acting Chairman
Certificate of Need Review Board

Done this 3rd day of December, 1991.

RULING OF THE CERTIFICATE OF NEED REVIEW BOARD

AL-91084 Alacare Home Health Services, Inc.
Birmingham, Alabama

FACTS:

1. This is a Certificate of Need application for the expansion of the applicant's services to include DeKalb County. Capital costs associated with this project was $9,000 for equipment. This application was batched with and heard comparatively with AL-9027, Baptist Medical Center DeKalb. This application was not considered by the Board as originally scheduled on July 9, 1991, as AL-91034, ABC Home Health of Alabama, Inc. formally intervened and requested a contested case hearing. Subsequently, ABC Home Health of Alabama, Inc. withdrew their request for a contested case hearing and also withdrew application number AL-91034.

2. The proposed charges after the completion of this project will be $85.00 per visit for nursing, $85.00 for physical therapy, $85.00 for speech therapy, $85.00 for occupational therapy, $95.00 for social services and $45.00 for home health aide. Medicare reimburses based on actual cost per visit. Medicaid reimburses $27.00 for skilled nursing and aide visits. Blue Cross of Alabama pays for skilled nursing at $50.00 per visit.

3. Alacare Home Health Services, Inc. is an Alabama corporation based in Jefferson County, Alabama. Alacare holds CONs to serve nine north central Alabama Counties and two northeast Alabama Counties.

Based on the above facts, and upon the provisions of Section 21-22-264, *Code of Alabama*, 1975, the Board finds the following:

a. that the applicant is not the most appropriate applicant.

By vote of the Certificate of Need Review Board, for the reasons herein stated, Project Number AL-91084 is hereby disapproved.

/s/ F. Wallace Bromberg, Jr.
F. WALLACE BROMBERG, JR.
Acting Chairman
Certificate of Need Review Board

Done this 3rd day of December, 1991.

APPENDIX G

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1.

Citizenship Rights Not to Be Abridged by States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

CODE OF ALABAMA

ARTICLE 9.

CONTROL AND REGULATION OF DEVELOPMENT OF CERTAIN HEALTH CARE FACILITIES.

§ 22-21-260. Definitions.

As used in this article, the following words and terms, and the plurals thereof, shall have the meanings ascribed to them in this section, unless otherwise required by their respective context:

* * * *

(4) STATE HEALTH PLAN. A comprehensive plan which is prepared triennially and reviewed at least annually and revised as necessary by the statewide health coordinating council, with the assistance of the state health planning and development agency, and approved by the governor.

The state health plan shall provide for the development of health programs and resources to assure that quality health services will be available and accessible in a manner which assures continuity of care, at reasonable costs, for all residents of the state.

* * * *

(5) HEALTH CARE FACILITY. Such term shall include; General and specialized hospitals, including tuberculosis, psychiatric, long-term care and other types of hospitals, and related facilities such as, laboratories, out-patient

* * * *

§ 22-21-264. Criteria for state agency review.

The SHPDA, pursuant to the provisions of section 22-21-274, shall prescribe by rules and regulations the cri-

teria and clarifying definitions for reviews covered by this article. These criteria shall include at least the following:

(1) Consistency with the appropriate state health facility and services plans effective at the time the application was received by the state agency, which shall include the latest approved revisions of the following plans:

a. The most recent Alabama state health plan which shall include updated inventories and separate bed need methodologies for inpatient rehabilitation beds, impatient psychiatric beds and inpatient/residential alcohol and drug abuse beds.

b. Alabama state plan for services to the mentally ill.

c. Alabama state plan for rehabilitation facilities.

d. Alabama development disabilities plan.

e. Alabama state alcoholism plan.

f. Such other state plans as may from time to time be required by state or federal statute.

(2) The relationship of services reviewed to the long-range development plan (if any) of the person providing or proposing such services.

(3) The availability of alternative, less costly or more effective methods of providing such services.

(4) Determination of a substantially unmet public requirement for the proposed health care facility, service or capital expenditure that is consistent with orderly planning within the state and the community for furnishing cost-effective health care, such determination to be based upon the merits of the proposal after giving appropriate consideration to:

a. Financial feasibility of the proposed change in service of facility;

b. Specific data supporting the demonstration of need for the proposed change in facility or service shall be reasonable, relevant and appropriate;

c. Evidence of evaluation and consistency of the proposed change in facility or service with the facility's and the community's overall health and health-related plans;

d. Evidence of consistency of the proposal with the need to meet nonpatient care objectives of the facility such as teaching and research;

e. Evidence of review of the proposed facility, service or capital expenditure when appropriate and requested by other state agencies.

f. Evidence of the locational appropriateness of the proposed facility or service such as transportation accessibility, manpower availability, local zoning, environmental health, etc.;

g. Reasonable potential of the facility to meet licensure standards.

h. Reasonable consideration shall be given to medical facilities involved in medical education.

(5) Determination that the person applying is an appropriate applicant, or the most appropriate applicant in the event of duplicative applications, for providing the proposed health care facility or service, such determination to be established from the evidence as to the ability of the person, directly or indirectly, to render adequate service to the public, including affirmative evidence as to the following:

a. Professional capability of the facility proposing the capital expenditure;

b. Management capability of the facility proposing the capital expenditure;

c. Adequate manpower to enable the facility to offer the proposed service;

d. Evidence of the existence of the applicant's long-range planning program and an ongoing planning process;

e. Evidence of existing and ongoing monitoring of utilization and the fulfilling of unmet or under met health needs in the case of expansion;

f. Evidence of communication with all planning, regulatory, utility agencies and organizations that influence the facility's destiny.

(6) Consideration of the special needs and circumstances of those entities which provide a substantial portion of their services or resources, or both, to individuals not residing in the health service area in which the entities are located or in adjacent health service areas.

(7) The special needs and circumstances of health maintenance organizations.

(8) In case of a construction project, consideration shall be given to:

a. The costs and methods of the proposed construction including the costs and methods of energy provision; and

b. The probable impact of the construction project reviewed on the costs of providing health services. (Acts 1977, 1st Ex. Sess., No. 82, p. 1509, § 6; Acts 1982, 2nd Ex. Sess., No. 82-770, p. 249, § 4; Acts 1990, No. 90-468, § 1.)

§ 22-21-266. [Certificate of need]—Required findings for inpatient facilities.

No certificate of need for new inpatient facilities or services shall be issued unless the SHPDA makes each of the following findings:

(1) That the proposed facility or service is consistent with the latest approved revision of the appropriate state plan effective at the time the application was received by the state agency;

(2) That less costly, more efficient or more appropriate alternatives to such inpatient service are not available, and that the development of such alternatives has been studied and found not practicable;

(3) That existing inpatient facilities providing inpatient services similar to those proposed are being used in an appropriate and efficient manner consistent with community demands for services;

(4) That in the case of new construction, alternatives to new construction (e.g., modernization and sharing arrangement) have been considered and have been implemented to the maximum extent practicable; and

(5) That patients will experience serious problems in obtaining inpatient care of the type proposed in the absence of the proposed new service. (Acts 1977, 1st Ex. Sess., No. 82, p. 1509, § 7; Acts 1982, 2nd Ex. Sess., No. 82-770, p. 249, § 6.)

§ 22-21-275. Procedures for review of applications for certificates of need.

The SHPDA, pursuant to the provisions of section 22-21-274, shall prescribe by rules and regulations the procedures for review of applications for certificates of need and for issuance of certificates of need. Rules and regu-

lations governing review procedures shall include, but not necessarily be limited to, the following:

(1) Agreement with other review agencies for review procedures consistent with this article and federal regulations.

(2) Application procedures and forms of the application necessary to elicit and provide all necessary information as required by the review criteria.

(3) Establishment of a project review period of 90 days from the date the state agency determines that the application is complete and notification thereof is made to the applicant. The rules and regulations may provide for a period of not more than 15 days for determination of the completeness of the application, notification of the beginning and termination dates of the project review period and criteria for determining by the state agency of an extension of the project review period not to exceed 30 days with or without the consent of the applicant. An extension of the review period without limitation may be made with the written consent of the applicant. All reviews must be completed prior to the termination of the review period. If the state agency does not make a decision within the period of time specified for state agency review, the proposal shall be deemed to have been found not to be needed.

(4) Provision of a "nonsubstantive" review which shall be a modified review applicable to proposals for capital expenditures up to $500,000.00 and which:

a. Do not result in a substantial change in a service; or

b. Propose equipment to upgrade or expand an existing service; or

c. Increase the bed capacity by not more than 10 percent of the existing bed capacity; provided, that such increase in bed capacity is consistent with the state health plan.

(5) Public notification of receipt of application, review periods, public hearings, decisions of the state agency, fair hearings if requested and final decisions regarding a certificate of need.

(6) Public hearings on the application for the certificate of need. The SHPDA shall make provisions for a public hearing in the course of agency review if requested by one or more persons directly affected by the review.

(7) Schedule for reviews to include hearings before the review agencies, beginning and ending of review periods and time of the review period as provided in this section.

(8) Provision of the applicant to submit such information that he may deem advisable in justification of the application over and above the minimum information required by this article and the regulations adopted hereunder.

(9) Provisions for periodic reports by the health provider or applicant respecting the development of the proposal subject to review and for which a certificate of need is issued.

(10) Provisions for written findings, as appropriate, which the state used as the basis for its decision or any recommendation of the state agency. Such findings and recommendations shall be provided to the applicant and available to other interested persons upon request and upon payment of a reasonable fee to cover actual costs of reproduction and handling.

(11) Notification upon request of providers of health services and other persons subject to review

of findings, recommendations and decisions made under this article.

(12) Provision for a public hearing upon written request and for good cause by any person for the reconsideration of a decision by the SHPDA. Request for a public hearing shall be made in writing not more than 30 days subsequent to the date of the decision and shall have the effect of holding in abeyance the final decision subject to the outcome of the public hearing.

(13) Provision that no decision of the SHPDA under this article shall be deemed final until 31 days following the date of the decision.

(14) Provisions that any adverse decision may be appealed to an agency of the state (other than the SHPDA) designated by the governor. The appeal proceedings shall be conducted pursuant to the requirements of the state of Alabama, regulations adopted under this article and federal regulations. Request for a fair hearing by the applicant shall be made within 30 days of the decision by the state agency and shall have the effect of holding in abeyance the decision subject to the outcome of the fair hearing. The decision of the appeals agency shall be considered the final decision of the state agency; provided, that the applicant may appeal the decisions to the circuit court of the county in which the applicant resides or of the county in which the applicant is situated.

(15) Preparation and publication, at least annually, of reports by the state agency to the review being conducted, decision reached, certificates issued and status of proposals.

(16) Access by the general public to applications reviewed by the SHPDA and to other written material pertinent to the review.

(17) Provisions for letters of intent in the case of construction projects by persons proposing such projects. Letters of intent shall be in such detail as the SHPDA may direct by regulations. Letters of intent shall not substitute for the formal application for a certificate of need as provided in this article.

(18) Provision that the review procedure is being conducted and/or the nature and type of service or expenditure proposed. (Acts 1977, 1st Ex. Sess., No. 82, p. 1520, § 14: Acts 1979, No. 79-577, p. 1033, § 4; Acts 1982, 2nd Ex. Sess., No. 82-770, p. 249, § 13.)

APPENDIX I

STATE HEALTH PLANNING AGENCY ADMINISTRATIVE CODE

410-1-6-.04 Availability Of Alternatives.

(1) The availability of less costly, more efficient, more appropriate, or more effective alternatives to the proposed facility or service to be offered, expanded, or relocated will be considered.

(a) In the consideration of the availability of alternatives, priority may be given to those alternatives that are in existence.

(b) Less costly alternatives must be judged against the need for greater accessibility, availability, and the impact on the total health care system.

Statutory Authority: *Code of Ala. 1975*, §§ 22-21-264, 274.

410-1-6-.06 Additional Criteria For Determining Need.

(1) The following criteria shall be considered in determining whether a need for the project exists, which criteria shall be in addition to the criteria set forth in Section 410-1-6-.05:

(a) The need that the population served or to be served has for the services proposed to be offered, expanded, or relocated, will be considered. Specific data supporting the demonstration of need shall be reasonable, relevant, and appropriate. In cases involving the relocation of a facility or service, the extent to which a need will be met adequately by the proposed relocation or by alternative arrangements, and the effect of the relocation of the service on the ability of affected persons to obtain needed health care will be examined in determining whether there is a need for the proposed facility or service.

(b) *Population Statistics and Growth.* Unless clearly shown otherwise, current population estimates or projections published by the Center for Business and Economic Research, University of Alabama, and data from the SHPDA Division of Data Management will be considered to be the most reliable data available. Population factors are normally included within those methodologies contained in the State Health Plan for determining need.

(c) *Current and Projected Utilization in the Area.* The current and projected utilization of like facilities or services within the proposed service area will be considered in determining the need for additional facilities or services. Unless clearly shown otherwise, data, where available from the SHPDA Division of Data Management shall be considered to be the most reliable data available.

1. Current and projected utilization may be expressed in the State Health Plan as a guideline to the SHPDA Board. Where such is the case, the SHPDA Board should give due consideration to the guidelines.

(d) *Specialization of the Facility or Service.* The allocation of beds in the appropriate state plan addresses a general medical surgical bed need as well as a bed need for certain specialized services in the area. An applicant proposing to use such general medical surgical beds for a reviewable limited purpose service, such as obstetrical, must prove a need or an additional need in the service area.

(e) *Effect on Existing Facilities or Services.* The probable effect of the proposed facility or service on existing facilities or services providing similar services to those proposed shall be considered. When the service area of the proposed facility or service overlaps the service area of the proposed facility or service area of an existing facility or service, then the effect on the existing facility or service shall be considered. The applicant or interested party must clearly present the methodologies,

and assumptions upon which any proposed project's impact on utilization in affected facilities or services is calculated.

1. *Expanded Services or New Services.* Expansion of existing services may be reviewed more favorably than the establishment of new services as a generally more cost effective alternative, however, the availability and accessibility of services must be considered.

2. *Merger, Sharing, or Modernization of Services.* Any merger of services into one facility or entity from two or more facilities or entities which can be shown to result in lower health care costs without adversely affecting need of access will be considered a favorable factor. Sharing of services which result in lower health care cost shall be considered a favorable factor. Modernization of services as an alternative to new construction which result in lower health care costs shall be considered a favorable factor.

(f) *Community Reaction to the Facility or Service.* The community reaction to the facility should be considered. The applicant may, at its option, submit endorsements from community officials and individuals expressing their reaction to the proposal. If significant opposition to the proposal is expressed in writing or at a public hearing, the opposition may be considered an adverse factor and weighed against endorsements received. Absence of opposition may be considered a favorable factor.

Statutory Authority: *Code of Ala. 1975*, § 22-21-264.

410-1-6-.09 Appropriate Applicant.

(1) Determination shall be made that the person applying is an appropriate applicant, or the most appropriate applicant in the event of competing applications, for providing the proposed health care facility or service, such determination to be established from the evidence as to the ability of the person, directly or indirectly, to render adequate service to the public, including affirmative evidence as to the following:

(a) Professional capability of the facility proposing the capital expenditure.

1. If the applicant requires the services of a specialist, such as an open heart surgeon, the applicant will comment on the availability of such specialist.

(b) Management capability of the facility providing the capital expenditure.

(c) Adequate manpower, including health personnel and management personnel, enable the facility to offer the proposed service.

(d) Evidence of the existence of the applicant's long-range planning program and an ongoing planning process.

1. A copy of the long-range plan is not required to be provided to the state agency, however, a statement from the applicant regarding the plan will be required.

(e) Evidence of existing and on-going monitoring of utilization and the fulfilling of unmet or undermet health needs in the case of expansion.

(f) Evidence of communication with all planning, regulatory, utility agencies and organizations that influence the facility's destiny.

Statutory Authority: *Code of Ala. 1975*, § 22-21-264(5).

410-1-6-.17 Past Performance Of Existing Services and Facilities.

In the case of existing services or facilities, the quality of care provided by those services or facilities in the past will be considered.

Statutory Authority: *Code of Ala. 1975*, §§ 22-21-264, 274.

410-1-8-.22 Substance And Limitation Of Fair Hearing.

The primary purpose of the fair hearing is to determine whether the application meets the required findings

of *Code of Ala. 1975*, Section 22-21-266, if applicable, and whether it is consistent with the criteria and standards set out in these rules, and whether it is consistent with the appropriate state plan. The fair hearing officer may not consider the correctness, adequacy, or appropriateness of the criteria, standards, and plans against which the application was measured.

(a) The scope of review by the fair hearing officer shall be limited to the following issues:

1. whether the application meets the requirements of *Code of Ala. 1975*, Section 22-21-266, with respect to inpatient facilities or services, if applicable, as well as whether the application is consistent with each of the applicable criteria and standards set forth in Chapter 6 of these rules, and whether the application is consistent with the appropriate state plan;

2. whether the state agency acted in an arbitrary or capricious manner without a reasonable justification for the decision or absent fixed standards against which the application was measured, or whether the state agency otherwise abused its discretion in deciding among competing applications;

3. whether the state agency materially failed to follow review procedures as set out in these rules and whether the error was substantial in its effect.

(b) The following shall not be considered by the fair hearing officer and shall be deemed immaterial to the fair hearing:

1. the correctness, adequacy, or appropriateness of the criteria, standards or plans by which the application was measured; or

2. new evidence or argument, whether written or oral, which has not been considered by the Certificate of Need Review Board or Administrative Law Judge at any previous hearing; or

3. the determination of whether the proposal is a new institutional health service subject to review as defined by these rules.

Statutory Authority: *Code of Ala. 1975*, § 22-21-275(14).

410-1-8-.24 Entry Of Final Order By The Fair Hearing Officer.

Within forty-five (45) days after the close of the evidence, the fair hearing officer shall enter a final order respecting the issuance of a certificate of need, which final order shall contain findings of fact and conclusions of law regarding the application. The final order of the fair hearing officer shall be effective upon its filing with the state agency. The applicant or other party may appeal the decision to either the Circuit Court of Montgomery County or the circuit court of the county in which the applicant resides or of the county in which the applicant is situated.

Statutory Authority: *Code of Ala. 1975*, §§ 22-21-275(14), 44-22-206.